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Supreme Court, U.S.
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In The

Supreme Court of the United States

MEADOWLAKE CORPORATION, et al.,

Petitioners,

v.

STATE OF OHIO, ex rel. NANCY ROGERS, ATTORNEY GENERAL OF OHIO,

Respondent.

On Petition For Writ Of Certiorari To The Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Excessive Fines Clause of the Eighth Amendment to the United States Constitution applies to a civil, administrative fine assessed in a non-forfeiture case.

2) Whether the emphasis on the "punitive" nature of a fine as set forth in *Austin* or the distinction between remedial fines and punitive fines as delineated in *Bajakajian* applies when analyzing the constitutionality of a civil, administrative fine under the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

3) If the Excessive Fines Clause of the Eighth Amendment to the United States Constitution does apply to a civil, administrative fine, does the "grossly disproportionate" standard apply to a non-forfeiture case.

4) If the Excessive Fines Clause of the Eighth Amendment to the United States Constitution does apply to a civil, administrative fine, does the U.S. Civil Penalty Policy apply and what role, if any, does the ability to pay of the one on whom the fine is imposed play.

5) Whether the due process rights of Petitioners were violated when Petitioners were denied the opportunity to present evidence, cross-examine witnesses, and otherwise participate in an evidentiary hearing.

6) Whether the due process rights of Petitioners were violated where a court denies a continuance knowing that a corporation (that has a right to counsel in a quasi-criminal case) will be forced to proceed unrepresented.

PARTIES TO THE PROCEEDINGS

PETITIONERS
(DEFENDANTS AND APPELLANTS BELOW):

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CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Petitioners, Meadowlake Ltd. and Meadowlake Corporation state that Meadowlake Ltd. is a duly licensed, private, Ohio limited liability company with no parent companies. Meadowlake Corporation is a duly licensed, private, Ohio for-profit corporation with no parent companies. Meadowlake Ltd. owns and operates Meadowlake Golf and Swim Club. Meadowlake Corporation owns the land upon which Meadowlake Golf and Swim Club operates.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATE DISCLOSURE	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
CITATIONS FOR OPINIONS BELOW	1
BASIS FOR JURISDICTION IN THIS COURT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING CERTIORARI	6
I. THIS CASE PRESENTS THE OPPORTUNITY FOR THE UNITED STATES SUPREME COURT TO ADDRESS THE ISSUE OF WHETHER THE EXCESSIVE FINES CLAUSE APPLIES TO CIVIL, ADMINISTRATIVE FINES.	8
II. IF THE COURT ANSWERS THE PRECEDING IN THE AFFIRMATIVE, THIS CASE ALSO PRESENTS THE OPPORTUNITY FOR THE UNITED STATES SUPREME COURT TO SET FORTH THE ANALYSIS THAT SHOULD BE USED WHEN THE EXCESSIVE FINES CLAUSE IS APPLIED TO AN ADMINISTRATIVE FINE	14

TABLE OF CONTENTS – Continued

Page

III. THIS CASE PRESENTS SIGNIFICANT QUESTIONS WITH RESPECT TO THE DENIAL OF MEADOWLAKE'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 21

CONCLUSION 24

APPENDIX TABLE OF CONTENTS

Judgment Entry from the Ohio Supreme Court dated May 21, 2008 ..... App. 1

5th District Court of Appeals for the State of Ohio's Opinion ..... App. 2

5th District Court of Appeals for the State of Ohio's Judgment Entry ..... App. 26

Judgment Entry from Stark County, Ohio Court of Common Pleas dated August 4, 2008 ..... App. 27

Judgment Entry from Stark County, Ohio Court of Common Pleas dated August 1, 2008 ..... App. 42

Motion to Stark County, Ohio Court of Common Pleas for Evidentiary Hearing ..... App. 44

Meadowlake Ltd./Meadowlake Corporation's Memorandum to the Ohio Supreme Court ..... App. 50

Meadowlake Ltd./Meadowlake Corporation's Brief to the 5th District Court of Appeals for the State of Ohio ..... App. 69

TABLE OF AUTHORITIES

Page

CASES

Alexander v. U.S., 509 U.S. 544, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993) 7

Austin v. U.S., 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) ..... *passim*

Badders v. U.S., 240 U.S. 391, 36 S. Ct. 367, 60 L. Ed. 706 (1916) 7

Brown v. Dayton Malleable Iron, 1 Ohio St.3d 151, 438 N.E.2d 120 (1982) 18

Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989) 6

Cox for U.S. Senate Committee, Inc. v. Federal Election Commission, 2004 WL 783435 (N.D. Ill. Jan. 22, 2004) 15

Grannis v. Ordean, 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363 (1914) 21

Hannah v. Larche, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960) 22

Hudson v. U.S., 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997) 16

Jenkins v. McKeithen, 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969) 21

Jennings v. Mahoney, 404 U.S. 25, 92 S. Ct. 180, 30 L. Ed. 2d 146 (1971) 21

Kelly v. U.S. Environmental Protection Agency, 203 F.3d 519 (7th Cir. 2000) 17, 18

TABLE OF AUTHORITIES – Continued

Page

Newell Recycling Company, Inc. v. U.S. Environmental Protection Agency, 231 F.3d 204 (5th Cir. 2000) 17, 18

Pervear v. Commonwealth of Massachusetts, 72 U.S. 475, 18 L. Ed. 608 (1866) 7

Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932) 22

Savina Home Industries Inc. v. Secretary of Labor, 594 F.2d 1358 (1978) 23

Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983) 16

Towers v. City of Chicago, 173 F.3d 619 (7th Cir. 1999) 15, 16, 17

Union Savings Assn. The Homeowners Aid, 23 Ohio St. 2d 60, 262 N.E.2d 558 (1970) 22

U.S. v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d (1998) ..... *passim*

U.S. v. Halper, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989) 16

U.S. v. Lippert, 148 F.3d 974 (8th Cir. 1998) 11, 12

U.S. v. Nevada Power Company, 1990 WL 149660 (D. Nev. Jan. 1, 1990) 16, 17

U.S. v. Production Plated Plastics, Inc., 1992 WL 397725 (W.D. Mich. Sept. 4, 1992) 16, 17, 18

U.S. v. Production Plated Plastics, Inc., 61 F.3d 904 (1995) 16

TABLE OF AUTHORITIES – Continued

Page

U.S. v. Rad-O-Lite of Philadelphia, Inc., 612 F.2d 740 (1979) 22

U.S. ex rel. Tyson v. Amerigroup Illinois, Inc., 488 F.Supp.2d 719 (N.D. Ill. 2007) 15, 17

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. VI 1, 8, 22, 23

U.S. Const. amend. VIII ..... *passim*

U.S. Const. amend. XIV, §1 ..... 2, 8, 21, 23

18 U.S.C. §982(a)(1) 9, 10

22 U.S.C. §309(d) 2, 18, 19

31 U.S.C. §5316(a)(1)(A) 9

41 U.S.C. §55(a)(1) 12

Ohio Rev. Code Ann. §4705.01 22

Ohio Rev. Code Ann. Chapter 6109 4

LAW REVIEW ARTICLES

Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 Minn.L.Rev. 379, 381 (1976) 23

CITATIONS FOR OPINIONS BELOW

The trial court's opinion was not reported. The opinion of the 5th District Court of Appeals for the State of Ohio (App. 2-25) is reported at 2007 Ohio 6798, 2007 Ohio App. LEXIS 5949. The decision of the Ohio Supreme Court denying the Petitioners' Memoranda of Jurisdiction (App. 1) is reported at 2008 Ohio 2340, 886 N.E.2d 872.

BASIS FOR JURISDICTION IN THIS COURT

This case was timely appealed to the 5th District Court of Appeals for the State of Ohio. That court filed its opinion on December 17, 2007. The Ohio Supreme Court declined jurisdiction to hear Petitioners' timely filed appeal on May 21, 2008. Title 28 of the United States Code §1254(1) confers jurisdiction on the United States Supreme Court to review, on writ of certiorari, the opinion of the 5th District Court of Appeals for the State of Ohio.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

> committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].

The Eighth Amendment to the United States Constitution states: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Clean Water Act, 22 U.S.C. §309(d) states in part that:

> [i]n determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation,

any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

STATEMENT OF THE CASE

The underlying state case revolved around records violations and technical omissions stemming from Petitioners, Meadowlake Corporation's and Meadowlake Limited, LLC's (collectively referred to hereafter as "Meadowlake") ongoing dispute with the Ohio Environmental Protection Agency ("EPA") regarding whether Meadowlake was and is, in fact, a public water system subject to regulation.

The Meadowlake Golf and Swim Club ("Club") located in Canton, Ohio is operated by Petitioner, Meadowlake Limited, LLC; Petitioner, Meadowlake Corporation, is the holding company that owns the land on which the Club and golf course are located. Brief to the 5th District Court of Appeals for the State of Ohio. App. 69 at ¶1. There are two separate wells that service the property: a hard-water well used exclusively for irrigation of the golf course, and a separate soft-water well that services the Club and the Barr family residence that is also located on the property. App. 74 at ¶1.

In 1995, the Ohio EPA requested information on the wells. *Id.* Before Meadowlake could submit information to the Ohio EPA, the Ohio EPA arbitrarily

reclassified the well as ground water under the influence of surface water. This change in designation was made without any evidence of bacteria intrusion into the well, and without any change in circumstances surrounding the well. *Id.* at App. 75. It is from this re-classification of the well that the violations in this matter stem.

In 1999, the Ohio EPA informed Meadowlake that the well was re-designated as "ground water under the direct influence of surface water." *Id.* at App. 77. Thereafter, Meadowlake took reasonable steps toward obtaining city water from the City of Canton. However, Meadowlake was unsuccessful in procuring city water. *Id.* at App. 78. Because the well had not been abandoned or updated, nor an approved water filtration system had been constructed and installed as of 2001, the Ohio EPA considered Meadowlake to be in violation. *Id.*

In May 2002, the Ohio EPA issued unilateral administrative findings and orders finding that Meadowlake was in violation of Ohio Revised Code Chapter 6109.[1] *Id.* Meadowlake filed a Notice of Appeal challenging the unilateral administrative findings and orders and commenced a case with the Environmental Review Appeals Commission ("ERAC"). *Id.* On September 23, 2003, one week before the appeal before ERAC was to begin, the Director revoked his

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[1] Ohio Revised Code Chapter 6109 grants the Ohio EPA with the authority to enforce the provisions of the Clean Water Act.

unilateral administrative findings and orders. *Id.* ERAC dismissed Meadowlake's pending appeal as moot. *Id.* The revocation of the EPA's findings and orders and the subsequent dismissal of Meadowlake's appeal, led Meadowlake to believe that its public water system designation, and the resulting notices of violations, were retracted. *Id.*

However, on May 19, 2004, the State of Ohio filed a civil complaint, alleging that Meadowlake owned and operated a public water system, and was in violation for not having a license, failing to sample the water, and for not posting notice. *Id.* On March 23, 2006, the trial court granted Meadowlake's attorney leave to withdraw from the case. Meadowlake was then unsuccessful in retaining replacement counsel prior to the trial. *Id.* at App. 79.

The trial went forward on May 30, 2006, and Meadowlake was unable to cross-examine the State's witnesses, offer evidence, make objections or otherwise participate or defend itself in the proceedings. *Id.* at App. 79-80. Of particular note is the fact that at least one of the State's witnesses' testimony contradicted his earlier report related to the well. *Id.* at App. 76. Subsequently, in late June 2006, Meadowlake retained replacement counsel. *Id.* at App. 80. On July 11, 2006, Meadowlake, by and through counsel, moved the trial court for an evidentiary hearing in order to present evidence on the record. *Id.* Meadowlake's Motion was summarily denied on August 1, 2006. *Id.* On August 4, 2006, the final judgment entry was entered and the court assessed a $300,000.00

fine upon Meadowlake. Subsequently, Meadowlake appealed to the 5th District Court of Appeals. *Id.*

On October 17, 2007, the 5th District Court of Appeals for the State of Ohio affirmed the decision of the trial court holding that the Eighth Amendment to the United States Constitution does not apply to civil penalties and holding that Meadowlake's due process rights were not violated when the trial court proceeded with the evidentiary hearing even though the corporation was unrepresented. See App. 2-25. Meadowlake timely filed its Jurisdictional Memorandum to the Ohio Supreme Court. The Ohio Supreme Court declined to jurisdiction to hear Meadowlake's appeal on May 21, 2008. See App. 1.

REASONS FOR GRANTING CERTIORARI

The United States Supreme Court has had occasion to analyze the Excessive Fines Clause under the Eighth Amendment to the United States Constitution only a handful of times. In both *Austin v. U.S.*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993) and *U.S. v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d (1998), the Court has expressly held that Excessive Fines Clause limits the government's power to extract payments, whether in cash or in-kind, as punishment for some offense.

Furthermore, the Court has defined a "fine" as a payment to a sovereign as punishment for some offense. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S. Ct. 2909,

106 L. Ed. 2d 219 (1989). A forfeiture is a fine, within the Excessive Fines Clause, if it constitutes punishment for an offense. *Alexander v. U.S.*, 509 U.S. 544, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993); *Bajakajian*, *supra*.

However, the Court has not had occasion to analyze the Excessive Fines Clause as it relates to an administrative, civil fine, i.e. those specific cases where the fine is imposed by the government based upon conduct that violates a specific statutory scheme and where the fine imposed is not intended to be a forfeiture. In 1916, the Court ruled in *Badders v. U.S.*, 240 U.S. 391, 36 S. Ct. 367, 60 L. Ed. 706 (1916), that fines imposed under a fraud statute fall under the purview of the Eighth Amendment. Similarly, in 1866, the Court held that a fine imposed under a Massachusetts statute could be subject to review. *Pervear v. Commonwealth of Massachusetts*, 72 U.S. 475, 18 L. Ed. 608 (1866). Finally, the Court has recently held that the Excessive Fines Clause applies to a federal reporting statute. *Bajakajian*, *supra*. However, the penalty in this case was the forfeiture of the monies that were not reported to customs.

In addition to, and because of, the fact that the Court has not yet addressed the Excessive Fines Clause in relation to an administrative fine, confusion has developed within the Circuit Courts and District Courts as to whether and how to apply the Court's recent analysis in *Austin* and *Bajakajian* in such cases. As a result, the Court should grant Meadowlake's Petition.

Finally, this case involves the denial of Meadowlake's Due Process Rights. The trial court denied Meadowlake the opportunity to present evidence, cross-examine witnesses, and otherwise participate at the evidentiary hearing in this matter. This decision denied Meadowlake's Fourteenth Amendment Due Process Rights. Also, it is well-settled that the Sixth Amendment to the United States Constitution requires that a corporate defendant in a criminal and a quasi-criminal case be represented by counsel. The case at the Ohio trial court level constitutes a quasi-criminal matter. As such, when the trial court denied Meadowlake's motion for a continuance (knowing full well that Meadowlake would have to proceed to trial and that it could not represent itself), the trial court effectively denied Meadowlake's Sixth Amendment right to counsel. And, for that reason, Meadowlake's Petition should also be granted.

I. THIS CASE PRESENTS THE OPPORTUNITY FOR THE UNITED STATES SUPREME COURT TO ADDRESS THE ISSUE OF WHETHER THE EXCESSIVE FINES CLAUSE APPLIES TO CIVIL, ADMINISTRATIVE FINES.

As noted above, the Court's relatively recent opinions in *Austin* and *Bajakajian* have made it clear that the Excessive Fines Clause applies to fines imposed in forfeiture cases. However, it has been suggested that the Court's differing analysis in the two cases has created some confusion as to whether

and how to apply their holdings in administrative fines cases. In fact, the dissent in *Bajakajian*, *supra*, specifically states that the disparate analyses in the two cases leaves open the question of whether the Excessive Fines Clause applies to administrative fines.

In *Bajakajian*, *supra*, customs inspectors charged the respondent with attempting to leave the United States without reporting that he was carrying cash in excess of $10,000.00, as required by 31 U.S.C. §5316(a)(1)(A). The United States then sought forfeiture of the entire $357,144.00 that he was carrying under 18 U.S.C. §982(a)(1). The District Court and Ninth Circuit both concluded that full forfeiture would be grossly disproportional to the offense in question and would therefore violate the Excessive Fines Clause of the Eighth Amendment. This Court agreed. For the Court, the "touchstone" of the constitutional inquiry was whether the fine imposed was proportional to the gravity of the offense. *Id.* at 334.

In doing so, this Court rejected the United States' argument that 18 U.S.C. §982(a)(1) was remedial in nature and, thus, not subject to the Excessive Fines Clause. It was in the Court's rejection of this argument that gives rise to the potential confusion alluded to above. The United States argued that forfeitures served an important remedial purpose because the forfeiture deterred the illicit movement of cash and the forfeiture gave the government valuable information to investigate and detect criminal activity. *Bajakajian*, *supra*, at 329. The Court, however,

rejected this argument because the United States relied upon cases that involved civil *in rem* forfeitures, i.e. cases against the "guilty" property rather than *in personam* cases, which were cases against the "guilty" person. *Id.*

Specifically, it was the resurrection of the distinction between the *in rem* and *in personam* forfeitures that bothered the dissent. *Id.* at 344-45. The United States argued that the forfeiture of all of Bajakajian's money was proportional to his offense because 18 U.S.C. §982(a)(1) descended from other statutes, enacted at roughly the same time as the Eighth Amendment, which required full forfeiture of goods involved in customs offenses or the payment of monetary penalties proportioned to the goods' value. *Id.* at 331-32. The Court rejected this argument because those early customs statutes did not punish for a criminal offense. *Id.* at 332. They were civil *in rem* forfeiture actions where the government proceeded against the "guilty" property itself. *Id.* This made the forfeitures remedial in nature and not punitive. Likewise, statutes that imposed monetary forfeitures proportioned to the value of the goods involved served the remedial purpose of reimbursing the government from the evasion of customs duties, and not of punishing the wrongdoers. *Id.* In essence, if the fine is remedial in nature, the Excessive Fines Clause does not apply; if it is punitive in nature, then it does.

The problem created by this analysis arises when *Bajakajian* is read together with *Austin*. In *Austin*, the Court stated that the determinative question is

not whether a forfeiture is civil or criminal but whether the forfeiture is a monetary punishment. Because a fine may serve more than one purpose, the fact that a forfeiture serves both remedial goals and punitive goals will not exclude it from analysis under the Excessive Fines Clause. The seemingly disparate analysis between the two cases was alluded to by Justice Kennedy in his dissent in *Bajakajian*. He states:

> In striking down this forfeiture, the majority treats many fines as "remedial" penalties even though they far exceed the harm suffered. Remedial penalties, the Court holds, are not subject to the Excessive Fines Clause at all. . . . Proceeding from this premise, the majority holds customs fines are remedial and not at all punitive, even if they amount to many times the duties due on the goods. . . . In the majority's universe, a fine is not a punishment even if it is much larger than the money owed. This confuses whether a fine is excessive with whether it is a punishment.

Bajakajian, *supra,* at 345. The danger, notes Justice Kennedy, is that the Court "appears to remove important classes of fines from any excessiveness inquiry at all." *Id*. at 344.

At least one Circuit Court also expressed concern over the inconsistencies in the two opinions. In *U.S. v. Lippert*, 148 F.3d 974 (1998), the 8th Circuit applied this Court's analysis in *Austin* to find that the

civil penalty authorized in 41 U.S.C. § 55(a)(1) (the civil penalty provision under the Anti-Kickback Act) is punitive because it is intended to serve in part as punishment. However, and more importantly, the court stated that there was a "strong conflicting signal" from *Bajakajian*. *Id.* at 978. The court further stated:

> If the *Bajakajian* dissenters have properly construed the majority opinion, then civil penalties imposed under 41 U.S.C. § 55(a)(1) may not be subject to the Excessive Fines Clause at all, because like customs forfeitures they serve the remedial purpose of reimbursing the government for losses accruing from kickbacks.

Id. Most telling, the court then stated that the issue of whether the Excessive Fines Clause applies to Anti-Kickback Act civil penalties is important, and "***we are not certain how the Supreme Court will resolve it***." *Id.* (Emphasis added.) The *Lippert* court dodged this question by finding that, if the Excessive Fines Clause did apply, then the fine was not constitutionally excessive.

The *Lippert* court has succinctly identified the confusion caused by the disparate analysis in *Austin* and *Bajakajian*. Circuit courts, first and foremost, do not know whether or not to apply the Excessive Fines Clause analysis to administrative fines cases. If the analysis were as straightforward as set forth in *Austin*, all a reviewing court would have to do is to consider whether or not the statute which provides

for the fine is punitive in nature at all. However, after *Bajakajian*, the analysis is not as simple as that. What if the fine serves a remedial purpose as well as punitive one? What if the fine is considered civil and not criminal because of the underlying case? Does this change the punitive nature of the fine? Does it remove such a fine from the analysis altogether? After all, the *Bajakajian* Court specifically found that early customs statutes that provided for fines equal to ***three*** times the value of the goods not reported, were purely remedial fines and not subject to analysis under the Excessive Fines Clause. As Justice Kennedy pointed out how can a statute, designed to recover the value of goods not reported to customs, which charges a fine equal to three times the value of the goods not be considered, at least in part, to be punitive.

Furthermore, in any case involving an administrative fine in which an appellant challenges the excessiveness of the fine, a court simply has to conclude that the fine is remedial in nature and there would be no review under the Excessive Fines Clause. In fact, that is exactly what happened in this case. The 5th District Court of Appeals for the State of Ohio specifically stated that "while [Meadowlake contend] that the penalty imposed is excessive and thus violates the Eighth Amendment to the United States Constitution, the Eighth Amendment generally applies to criminal matters, not to civil matters." See App. 25 at ¶68. However, this proposition was expressly rejected in *Austin*: "Thus, the question is

not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment." *Austin*, *supra* at 610. As Justice Kennedy noted in his dissent, an entire important class of fines may be removed from the excessiveness inquiry altogether.

In the end, there is confusion over whether the potential excessiveness of a civil, administrative fine can be analyzed under the Excessive Fines Clause. Must the fine be purely punitive? Can the fine be punitive and remedial in nature and still be analyzed? Or, are such fines excluded altogether from the analysis? But then, how can this be the case when this Court has specifically defined "fine" as the payment to a sovereign for some offense? This case presents the opportunity for the Court to answer these questions and provide guidance to the lower courts.

II. IF THE COURT ANSWERS THE PRECEDING IN THE AFFIRMATIVE, THIS CASE ALSO PRESENTS THE OPPORTUNITY FOR THE UNITED STATES SUPREME COURT TO SET FORTH THE ANALYSIS THAT SHOULD BE USED WHEN THE EXCESSIVE FINES CLAUSE IS APPLIED TO AN ADMINISTRATIVE FINE.

Assuming *arguendo* that the Excessive Fines Clause does apply to civil, administrative fines, then the next question becomes "what standard applies?" This Court has made it clear that, when judging excessiveness under the Clause, the most important

question is proportionality of the fine to the offense for which the fine is imposed. However, the Circuit courts and the District courts that have analyzed the excessiveness of these types of fines have used a range of analyses in coming to their conclusions. In addition, the issue arises as to the interplay between the U.S. Civil Penalty Policy and the Court's opinions in *Austin* and *Bajakajian*. Again, this case presents the opportunity for this Court to answer these questions.

The court in *U.S. ex rel. Tyson v. Amerigroup Illinois, Inc.*, 488 F.Supp.2d 719 (N.D. Ill. 2007) analyzed a fine using *Austin* and *Bajakajian* and applied the Court's *dicta* from *Bajakajian* in determining proportionality. Specifically, the *Tyson* court looked at the extent and nature of the harm caused; the possible maximum penalty; and the class of persons for whom the statute was designed. *Id.* at 744, citing *Bajakajian*, *supra*, at 339-40.

However, in *Towers v. City of Chicago*, 173 F.3d 619 (7th Cir. 1999), the court applied a "gross disproportionality" test as called for in *Bajakajian*. But, in determining whether a fine was in fact grossly disproportionate the court also considered four factors that differed from *Tyson* and are not mentioned specifically in *Bajakajian*: the gravity of Towers' violations; Towers' level of culpability; the harm caused by Towers' violations; and a comparison of the fine to the gravity of Towers' violations. Furthermore, the court in *Cox for U.S. Senate Committee, Inc. v. Federal Election Commission*, 2004 WL 783435 (N.D.

Ill. Jan. 22, 2004) likewise applied the *Towers'* factors in its consideration of the excessiveness of a fine.

In *U.S. v. Nevada Power Company*, 1990 WL 149660 (D. Nev. June 1, 1990), a case which pre-dates both *Austin* and *Bajakajian*, the court still applying a proportionality standard consistent with the U.S. Supreme Court's other holdings in criminal cases, also looked at the gravity of the conduct which gave rise to the fine as well as a comparison between civil and criminal penalties within the same jurisdiction to civil and criminal penalties from other jurisdictions. *Id.* at *5. See generally *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637, upon which the *Bajakajian* court somewhat relies.

In *U.S. v. Production Plated Plastics, Inc.*, 1992 WL 397725 (W.D. Mich. Sept. 4, 1992), the district court stated that "as a general rule, however, civil penalties designed with both retributive and deterrent goals in mind are not unconstitutional." *Id.* at *8, and citing *U.S. v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989), overruled on other grounds by *Hudson v. U.S.*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997). However, on appeal to the 6th Circuit, that court analyzed the Resource Conservation and Recovery Act ("RCRA") fine under the Eighth Amendment. *U.S. v. Production Plated Plastics, Inc.*, 61 F.3d 904, 1995 WL 428451 at *4 (1995). It affirmed the lower court's decision by comparing the defendant's fine with other fines in the environmental arena while at the same time questioning whether the Excessive Fines Clause even

applied to a RCRA civil penalty. *Id.* at *4-*5. Notably, this case was decided after *Austin*.

Finally, there is *Newell Recycling Company, Inc. v. U.S. Environmental Protection Agency*, 231 F.3d 204 (5th Cir. 2000) and *Kelly v. U.S. Environmental Protection Agency*, 203 F.3d 519 (7th Cir. 2000), both decided after *Bajakajian*. In *Newell*, the court announced that "no matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment." *Newell*, *supra*, at 210. Likewise, the *Kelly* court stated that it would not find that a fine was a excessive under the Eighth Amendment when "Congress has made a judgment about the appropriate punishment." *Kelly*, *supra*, at 524. Although the *Bajakajian* court notes that deference should be given to the statutory scheme imposed by Congress, this was not intended to eviscerate a court's role in the system of checks and balances.[2]

So, utilizing the above cases, a court can employ several methods for analyzing a fine under the Excessive Fines Clause. It can use the factors in *Bajakajian*, the factors in *Tyson*, the factors in *Towers*, or the factors in *Nevada Power*. Or, it can avoid the analysis

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[2] It should be noted that the *Kelly* court appears to accept the fact that the Excessive Fines Clause analysis applies to civil, administrative fines (as they are in the form of a "punishment") but they categorically deny that the Excessive Fines Clause could ever be used to strike a fine permitted by Congress.

altogether by holding that if a fine is within the range set forth by Congress it is not excessive (*Newell* and *Kelly*) or that the Excessive Fines Clause does not apply to civil fines at all (*Production Plated Plastics I* or Ohio's 5th District Court of Appeals).

Finally, what are courts to make of the U.S. EPA's Civil Penalty Policy as found in the Clean Water Act, 22 U.S.C. §309(d). That portion of the Clean Water Act states that a court may consider (1) the seriousness of the violation or violations, (2) the economic benefit (if any) resulting from the violation, (3) any history of such violations, (4) any good-faith efforts to comply with the applicable requirements, (5) the economic impact of the penalty on the violator, and (6) such other matters as justice may require. Of these six factors, only the first is mentioned in *Bajakajian*. As such, a court reviewing a fine for excessiveness now has the statutory factors contained within the Clean Water Act to consider as well.

In fact, in the lower court, Meadowlake asked the court for consideration of these factors, especially the economic impact of the penalty of the violator, i.e. Meadowlake's ability to pay. Such a request was supported by the Ohio Supreme Court case of *Brown v. Dayton Malleable Iron*, 1 Ohio St.3d 151, 438 N.E.2d 120 (1982) which stated that the ability to pay was a significant factor in assessing a fine. *Id.* at 159. In a case where an arbitrary fine is imposed, i.e. a situation where there is no forfeiture of property or cash used in the commission of a crime, there is no remedial fine imposed to reimburse the government

for damage done by the violator, and where the fine is based upon a fairly wide range of acceptable penalties contained within a statutory scheme, Meadowlake requested the lower court to consider its ability to pay when analyzing the excessiveness of the fine.

After all, the gross proportionality test contemplated in *Bajakajian* can be applied rather easily in the cases of criminal forfeiture because there is a basis upon which to judge proportionality. In other words, the Court had before it the fact that Bajakajian was ordered to forfeit every penny with which he had tried to leave the country. The basis, then, to judge proportionality was $357,144.00. This variable in the excessiveness analysis was, in essence, a constant given the facts of the case. However, when dealing with a civil, administrative fine, where Congress permits "up to" a certain amount for each violation for each day, the courts are vested with a broad range of discretion. The variables are many for a court and different courts may arrive at different fines for the same conduct. Likewise, the fine in administrative cases is not tied to a particular amount of damage caused by the violator or a disgorgement of property from a criminal defendant. This then begs the question, upon what factors are the courts to begin the analysis of proportionality?

That question is answered, in part, by the factors set forth in the Clean Water Act, but which factors are not found in the Court's previous Excessive Fines Clause cases. Of particular importance to Meadowlake is its inability to pay the $300,000.00 fine

imposed upon it. Nowhere is it alleged that Meadowlake caused $300,000.00 of damage to the State of Ohio nor is it alleged that somehow Meadowlake profited by that amount through its violative conduct. The fine is arbitrary, although granted it is within the permitted statutory scheme.

Again, the varying analyses could lead to varying results. A court reviewing the excessiveness of Meadowlake's fine in this case could consider the nature and extent of the harm caused and find it excessive or may emphasize the fact that the protection of the environment is tantamount and find the fine acceptable. A court may compare Meadowlake's fine with similar fines assessed to other companies for the same conduct and find that it is appropriate, or the court may determine that because this particular company cannot afford the fine (where another company could), the fine is excessive. Finally, the court could decline to pass judgment on the excessiveness of the fine altogether for the reasons set forth above. All of these conclusions, in one way or another, could be justified by the cases cited herein. As such, this case presents this Court with the opportunity to set forth particular standards as to how to analyze a civil, administrative fine under the Excessive Fines Clause.

III. THIS CASE PRESENTS SIGNIFICANT QUESTIONS WITH RESPECT TO THE DENIAL OF MEADOWLAKE'S DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Due process requires that a party whose rights are sought to be affected be afforded a full hearing with the opportunity to introduce evidence on one's behalf and have judicial findings based upon it. *Jennings v. Mahoney*, 404 U.S. 25, 26, 92 S. Ct. 180, 30 L. Ed. 2d 146 (1970). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Grannis v. Ordean*, 234 U.S. 385, 34 S. Ct. 779, 58 L. Ed. 1363 (1914). Due process implies the right to contradict by proof every material fact which bears on the question of the rights involved. *Jennings*, *supra*. There is no hearing, in the constitutional sense, where the party is not given a meaningful opportunity to test, explain, or refute evidence. *Id.* at 26; *Jenkins v. McKeithen*, 395 U.S. 411, 428, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969). The right to present evidence is essential to a fair hearing required by the Due Process Clause. *Jenkins*, *supra*, at 429. In the case at hand, Meadowlake was denied the opportunity to present evidence, to cross-examine witnesses, and to otherwise participate in the evidentiary hearing on the merits. The denial of these basic fundamental rights to defend oneself in court is an obvious denial of Meadowlake's due process rights.

The appellate court stated that "as an initial matter, we note that [Meadowlake] never filed a written motion for continuance of the May 30, 2006 trial." App. 12. The court could not have considered such a motion even if Meadowlake had so moved, because, was an unrepresented corporate defendant, the trial court could not have entertained the motion. Ohio Revised Code §4705.01 prohibits anyone from practicing law or commencing or defending an action in which he or she is not a party concerned unless he or she has been admitted to the bar by order of the Supreme Court of Ohio. Furthermore, a corporation cannot maintain litigation or appear in Court through an officer of the corporation or an appointed agent who is not admitted to the practice of law. *Union Savings Assn. The Homeowners Aid*, 23 Ohio St. 2d 60, 262 N.E.2d 558 (1970).

A corporation has a Sixth Amendment right to counsel. *U.S. v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (1979), citing generally *Powell v. Alabama,* 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). The Sixth Amendment right to counsel includes criminal and quasi-criminal proceedings. *Hannah v. Larche,* 363 U.S. 420, 440 n.16, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960). The term "quasi-criminal" has been defined as follows:

> Laws that provide for punishment but are civil rather than criminal in form have sometimes been labeled "quasi-criminal" by the Supreme Court. These laws, broadly speaking, provide for civil money penalties,

> forfeitures of property, and the punitive imposition of various disabilities, such as the loss of professional license or public employment.

Savina Home Industries Inc. v. Secretary of Labor, 594 F.2d 1358, 1362 (1978), citing Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 Minn.L.Rev. 379, 381 (1976).

Under this analysis, because the case at the trial court level provided for punishment in the form of civil money penalties, the case was of a quasi-criminal nature. The Sixth Amendment right to counsel extends to quasi-criminal matters. As such, Meadowlake had a Sixth Amendment right to counsel at the trial court level. By denying Meadowlake the opportunity to secure new counsel prior to the evidentiary hearing, by denying Meadowlake's request for a continuance, and by knowing that Meadowlake could not represent itself, the trial court, essentially, left Meadowlake with no other option but to proceed to trial unrepresented. As set forth above, this denied Meadowlake its Sixth Amendment right to counsel and violated Meadowlake's due process rights under the Fourteenth Amendment. For these reasons, Meadowlake's petition should be granted.

CONCLUSION

This case presents the United States Supreme Court with the opportunity to determine whether or not the Excessive Fines Clause applies to civil, administrative fines and, if so, what analysis a court should utilize. It presents the chance to clear up the disparate analysis between *Austin*, *supra*, and *Bajakajian*, *supra*, and to settle the manner in which lower courts are to apply the Excessive Fines Clause's "grossly disproportional" standard. Finally, this case presents the opportunity for the Court to remedy the due process violations suffered by Meadowlake. Accordingly, Petitioners, Meadowlake Corporation and Meadowlake Limited, LLC respectfully request the Court to grant its petition for *certiorari*.

Respectfully submitted,

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The Supreme Court of Ohio

State of Ohio ex rel. Mark Dann, Attorney General of Ohio

v.

Meadowlake Corporation et al.

Case No. 2008-0247

ENTRY

(Filed May 21, 2008)

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Stark County Court of Appeals; No. 2006CA00252)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, ex rel. MARK DANN, ATTORNEY GENERAL OF OHIO Plaintiff-Appellee -vs- MEADOWLAKE CORPORATION, et al. Defendants-Appellants	JUDGES: William B. Hoffman, P.J. Sheila G. Farmer, J. Julie A. Edwards, J. Case No. 2006 CA 00252 OPINION (Filed Dec. 17, 2007)

CHARACTER OF PROCEEDING:	Civil Appeal From Stark County Court Of Common Pleas Case No. 2004CV01672
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	

APPEARANCES:

For Plaintiff-Appellee	For Defendants-Appellants
GREGORY POULOS ASSISTANT ATTORNEY GENERAL OF OHIO 30 E. Broad Street, 25th Floor Columbus, Ohio 43215	ROBERT E. SOLES, Jr. KEVIN C. COX KARA DODSON FAITH R. DYLEWSKI 6531 Market Avenue, N., Ste. 100 North Canton, Ohio 44721

Edwards, J.

{¶1} Defendant-appellants Meadowlake Corporation and Meadowlake Limited, LLC appeal from the August 4, 2006, Judgment Entry of the Stark County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶2} Meadowlake Golf and Swim Club consists of a golf course, a swimming pool, a pro shop, a restaurant, a snack shop and a banquet facility. Prior to the construction of the golf course, which started in 1963 as a nine hole course, the Barr family operated a dairy farm on the subject property. The dairy barn was converted into a clubhouse.

{¶3} Currently, Meadowlake Golf and Swim Club is operated by appellant Meadowlake, Ltd., which came into legal existence in 2001, whereas appellant Meadowlake Corporation owns the land on which the club and golf course are located. Roy Barr is the Chief Executive Officer of both Meadowlake Corporation and Meadowlake Ltd. A well located in the basement of the farmhouse supplies water to the farmhouse, the pool house, and the club house.

{¶4} In approximately 1995, the Ohio Environmental Protection Agency ("Ohio EPA") determined that appellant Meadowlake Corporation owned and operated a "public water system" on the subject property and, therefore, was required to obtain an operational license from the Ohio EPA. Appellant

Meadowlake Corporation obtained licenses to operate a public water system on the subject property in 1996 through 1998. However, neither appellant Meadowlake Corporation nor Meadowlake Ltd., have applied for or been granted such a license since such time.

{¶5} Thereafter, in August of 1999, the Director of the Ohio EPA issued a proposed action designating the public water system on appellants' property as a source of water "under the influence of surface water." Prior to such time, the well source classification had been "Ground Water." The Ohio EPA, via a letter issued on August 11, 1999, with an effective date of September 27, 1999, designated the water source at Meadowlake Golf & Swim Club as a surface water source. As a result of such designation, the monitoring and treatment requirements for the water system changed. Whereas, prior to such designation, Meadowlake Golf & Swim Club had to provide one bacteria sample per quarter and a nitrate sample once a year, after such designation, Meadowlake Golf & Swim Club was required to provide four bacteria samples a month and a nitrate sample every month. In addition, the letter sent to Meadowlake Golf and Swim Club advised appellants that they had 18 months, or until April of 2001, to exercise one of five options to bring the public water system at the Meadowlake property into compliance. The five options were as follows:

{¶6} "a. installation of approved filtration treatment and disinfection which complies with OAC Rule 3745-81-73;

{¶7} "b. eliminating the construction and isolation defects of your existing well(s) so that it (they) may be re-evaluated and redesignated as ground water;

{¶8} "c. abandonment of those wells designated as surface water and installation of adequate approved ground water sources;

{¶9} "d. abandonment of your surface water source(s) and installation of an approved hauled water system; or

{¶10} "e. abandonment of your surface water source(s) and purchasing water from an approved public water system."

{¶11} From November of 1999 on, the Ohio EPA sent numerous letters to Ray Barr of Meadowlake Golf and Swim Club advising him that Meadowlake's public water system was in violation of the Ohio Administrative Code.

{¶12} On or about February 23, 2001, the Ohio EPA sent Meadowlake Golf and Swim Club a warning letter stating that, by March 27, 2001, it was required to make changes in its system and "receive a ground water designation for your sources or install surface water treatment."

{¶13} On or about May 7, 2002, the Director of the Ohio EPA issued a document captioned "Director's Unilateral Administrative Findings and Orders" to Roy Barr, as owner of Meadowlake Golf & Swim Club, stating, in relevant part, as follows:

{¶14} "I am writing with regard to the violations of Ohio's safe drinking water rules at the Meadowlake Golf & Swim's public water system. Specifically, you have failed to comply with source water designation requirements, failed to install filtration treatment, failed to monitor for total coliform bacteria and nitrate, failed to prepare and maintain a written sample siting plan, failed to issue public notices, and operated a public water system without a license. These violations present a serious health risk to Meadowlake Golf & Swim's consumers."

{¶15} In response, Roy Barr filed a Notice of Appeal challenging the "Director's Unilateral Administrative Findings and Orders". The Director revoked his unilateral findings and orders on September 23, 2003 and Roy Barr's pending appeal was dismissed.

{¶16} Subsequently, on May 19, 2004, the State of Ohio filed a complaint against appellants alleging that they owned and operated a public water system and were in violation of Chapters 6109 and 6111 of the Ohio Revised Code and regulations adopted thereunder for failing to maintain a public water license, failing to maintain a written sample siting plan, and failing to sample the water adequately for both nitrates and bacteria. The State of Ohio further alleged that appellants had failed to notify the public of the violations and had violated water well standards. The State of Ohio, in its complaint, sought both injunctive relief and a civil penalty of $25,000.00 a day for each day there has been a violation. The State of Ohio specifically sought to enjoin appellants

to achieve compliance with water well standards and with regulations concerning surface water. The State of Ohio also sought to enjoin appellants to obtain and maintain a license to operate a public water system, among other matters.

{¶17} On July 19, 2004, Roy E. Barr, as Trustee of the Roy E. Barr Living Trust, filed a motion to intervene as a defendant. Barr, in his motion, indicated that he was the sole owner of appellant Meadowlake Corporation and, in his individual capacity, owned 99% of appellant Meadowlake, Ltd. The trial court granted such motion pursuant to a Judgment Entry filed on September 2, 2004.

{¶18} The trial court, over the State's objection, bifurcated the case and, on January 9, 2006, a jury trial commenced on the sole issue of whether appellants owned or operated a public water system. However, the trial court declared a mistrial, finding, in a "Declaration of Mistrial" filed on January 13, 2006, that the "inappropriate and extra-issue scope of the comments of Roy Barr prejudiced the jury to such an extent that 'the ends of public justice' could not be attained in this matter without discontinuing the trial."

{¶19} An Assignment Notice was filed on March 9, 2006, setting the matter for a new jury trial on May 30, 2006. On the same day, appellants' counsel filed a motion for leave to withdraw as counsel for appellants, indicating that appellants had failed to make any payments on their account

since mid-January and had "failed to make any satisfactory provisions for payment of their substantial account balance . . . despite written and oral requests to do so." Roy E. Barr, in a letter to the trial court dated March 10, 2006, and filed on March 14, 2006, indicated that appellants' counsel's employment was terminated on the day such counsel had filed the motion to withdraw. On the same day, appellants, through Ray E. Barr, filed a response indicating that they had no objection to their counsel's request to withdraw. Appellants, in their response, indicated that Roy E. Barr was out of the state during the winter months for health reasons and that they would retain a new attorney once he returned to Ohio on April 20, 2006. Appellants' counsel, on March 20, 2006, filed a Notice of Withdrawal as counsel.

{¶20} As memorialized in an Order file on March 23, 2006, the trial court granted the Motion for Leave to Withdraw as counsel. The trial court, in its order, noted that appellants, as corporate entities, could not proceed in court without being represented by counsel. The trial court, in its Order, further stated, in relevant part, as follows:

{¶21} "Therefore, the Defendants are ordered to immediately secure the representation of other counsel in order to proceed in this matter, or if they choose to waive the representation of counsel to understand that any non-attorney even though an officer of any of the Defendant corporations or an appointed agent of any of the Defendant corporations could not file pleadings, present further defense regarding the

issue before the court, or otherwise represent the interests of the corporate defendants."

{¶22} On May 16, 2006, the State of Ohio filed a motion asking the trial court to reconsider it decision allowing the jury to hear any part of the case. The State of Ohio, in its motion, indicated, in part, that appellants did not have a right to a jury trial on any issue in the case sub judice under either common law or under the statute under which the action had been brought. The trial court, pursuant to an Order filed on May 19, 2006, sustained such motion and ordered that a bench trial be held on May 30, 2006.

{¶23} At the trial on May 30, 2006, appellants, who were not represented by counsel, were not permitted to cross-examine the witnesses, offer evidence, make objections, or in any way participate or defend themselves. At the conclusion of the trial, the trial court took the matter under advisement and asked the State of Ohio to submit written findings of fact and conclusions of law.

{¶24} Subsequently, on July 11, 2006, appellants, who had since secured counsel, filed a Motion for an Evidentiary Hearing. Appellants, in their motion, asked for an order permitting them to present evidence prior to the required post trial briefing. Appellants argued that, "due to the short timeframe and the complex environmental nature of the subject matter", they had been unable to retain replacement counsel in time for the May 30, 2006, trial. The trial court, as memorialized in a Judgment file on August

1, 2006, overruled such motion, stating, in relevant part, as follows:

{¶25} "Being advised in the premises, the motion and briefs of counsel, the court does not find the Defendants' motion well taken and overrules the same. The Defendants, having been advised of the consequences of their failure to hire new counsel to appear at the May 30, 2006 trial delayed such hiring themselves. The attorney, whom the Defendants state was unavailable to appear at the trial due to serious personal injuries, had never entered an appearance in this matter and was never counsel of record in the action. Prejudice to the Defendants, if any, was caused by their own acts. The Defendants here, in fact, are requesting a post-trial continuance of the matter."

{¶26} Thereafter, pursuant to a Judgment Entry filed on August 4, 2006, the trial court found that appellant "Meadowlake Corporation and/or [appellant] Meadowlake Ltd. own(s) and/or operate(s) a 'public water system' as such term is defined in R.C. 6109.01(A) and Ohio Administrative Code (O.A.C.) 3745-81-01(FFF)." The trial court further found that appellant Meadowlake Corporation and/or appellant Meadowlake Ltd had violated R.C. Chapter 6109 and rules adopted under the authority of the same and/or orders issued by the Ohio EPA by, among other matters, operating without a public water system license and failing to collect total coliform routine samples and monitor for the presence of coliform bacteria once each calendar year. The trial court ordered appellants

Meadowlake Corporation and Meadowlake Ltd., jointly and severally, to pay $300,000.00 in civil penalties and also granted the injunctive relief requested by the State of Ohio. The trial court, it its entry, found that such appellants had committed more than 1,000 intentional violations of R.C. Chapter 6109. The trial court ordered appellants to obtain a public water system license, to comply with surface water treatment rules and water well standards, and to monitor the water supply, among other matters.

{¶27} Appellants now raise the following assignments of error on appeal:

{¶28} "I. THE TRIAL COURT ERRED BY PROCEEDING TO TRIAL ON MAY 30, 2006, WITH THE KNOWLEDGE THAT MEADOWLAKE DEFENDANTS WERE UNREPRESENTED BY COUNSEL FOR REASONS BEYOND THEIR CONTROL.

{¶29} "II. THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION FOR EVIDENTIARY HEARING THEREBY DENYING APPELLANTS THE OPPORTUNITY TO PROFFER EVIDENCE, CROSS EXAMINE WITNESSES, PRESERVE ERRORS, OR OTHERWISE DEFEND THEIR POSITION.

{¶30} "III. THE TRIAL COURT ERRED BY DENYING APPELLANT'S DEMAND FOR JURY TRIAL.

{¶31} "IV. THE PENALTIES THAT THE TRIAL COURT AWARDED TO THE OHIO EPA ARE

EXCESSIVE, ARBITRARY, INAPPROPRIATE, AND IN VIOLATION OF APPELLANTS' DUE PROCESS RIGHTS."

I

{¶32} Appellants, in their first assignment of error, argue that the trial court erred by proceeding to trial on May 30, 2006, when it knew that appellants were unrepresented by counsel "for reasons beyond their control." We disagree.

{¶33} As an initial matter, we note that appellants never filed a written motion for a continuance of the May 30, 2006, trial. However, appellants now argue that the trial court should not have proceeded with the trial when they did not have sufficient time to retain substitute counsel after their former counsel withdrew. Appellants note that, in the spring of 2006, they contacted D. Patrick DeBoer, who had served as appellants' counsel in corporate matters, to represent them in the case sub judice and that because DeBoer was involved in a skiing accident on or about April 18, 2006, he was unable to represent appellant in the trial scheduled for May 30, 2006.

{¶34} As is stated above, appellants' first trial was declared a mistrial due to the behavior of Roy E. Barr. On March 9, 2006, the same day that a notice was issued setting a new trial date of May 30, 2006, appellants' counsel filed a motion to withdraw on the basis that appellants had not only failed to make any payments on their substantial account balance but

also "failed to make any satisfactory provisions for payment of their substantial account balance . . . despite written and oral requests to do so." At such point in time, the trial was approximately eighty (80) days away. While appellants now contend that they did not know that they could oppose the motion to withdraw, in a pro se response filed on March 14, 2006, they stated that they did not object to their counsel's withdrawal and that they would retain new counsel once Roy E. Barr returned to Ohio on April 20, 2006.

{¶35} The trial court, in its March 23, 2006, order, which was sent to all appellants, advised appellants that they needed to immediately secure counsel because corporate entities, by law, can only be represented by an attorney. However, as noted by the trial court in its August 4, 2006, Judgment Entry, no counsel ever entered an appearance on appellants' behalf or requested a stay of the proceedings.

{¶36} Based on the foregoing, we find that, contrary to appellants' argument, appellants' lack of counsel was not due to extenuating circumstances beyond their control. As noted by appellee, appellants' deliberate actions led to the withdrawal of their former attorney. While appellant had approximately eighty (80) days to secure new counsel, they failed to do so. We find, therefore, that the trial court did not err by proceeding to trial when it knew that appellants were unrepresented by counsel.

{¶37} Appellants' first assignment of error is, therefore, overruled.

II

{¶38} Appellant, in their second assignment of error, argue that the trial court erred in denying their July 11, 2006, Motion for an Evidentiary Hearing. We disagree.

{¶39} As is stated above, after the May 30, 2006, trial in this matter but before the trial court issued its decision, appellants, on July 11, 2006, through newly retained counsel, filed a motion requesting an order permitting appellants "to present evidence prior to the required post trial briefing in this matter . . . to permit [appellants] an opportunity to present evidence in this matter as the same opportunity was not available at trial due to circumstances beyond [appellants'] control." The trial court overruled such motion noting, in part, that appellants were, in fact, requesting a post-trial continuance. Appellants now maintain that they were denied their due process rights[1] to introduce evidence and cross-examine witnesses.

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[1] In the case of *Szerlip v. Szerlip*, Knox App. No. 01CA16, 2002-Ohio-2540, 2002 WL 1270849, we held: "The Ohio Constitution, Section 16, Article I, undeniably affords the parties in a civil case the right to due process of law, the 'basic thrust' of the clause being a requirement for notice and an 'opportunity to be heard.' See *Ohio Valley Radiology Assoc., Inc. v. Ohio Valley*

(Continued on following page)

{¶40} As is discussed above with respect to appellants' first assignment of error, we find that the withdrawal of appellants' original attorney and their failure to retain new counsel were not "circumstances beyond [appellants'] control". Appellants' own actions, rather than the actions of the trial court, resulted in their non-representation by counsel at trial. Based on the facts, it would be patently unfair to allow appellants to, in effect, participate in the trial by submitting evidence after the fact.

{¶41} Appellants' second assignment of error is, therefore, overruled.

III

{¶42} Appellants, in their third assignment of error, contend that the trial court erred in denying their demand for a jury trial. We disagree.

{¶43} Pursuant to Section 5, Article I of the Ohio Constitution, "[t]he right of trial by jury shall be inviolate[.] However, as noted by the Ohio Supreme Court in *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257, 849 N.E.2d 1004, "[t]he right to a jury trial is not, however, absolute. The Constitution does not entitle all civil litigants to a trial by jury. Instead, it preserves the right only for those civil cases in which the right existed before the

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Hosp. Assn. (1986), 28 Ohio St.3d 118, 124-125 [28 OBR 216], 502 N.E.2d 599. *Szerlip* at p. 5.

adoption of the constitutional provision providing the right." Id at paragraph 22.

{¶44} Pursuant to Article I, Section 5, of the Ohio Constitution and Section 2311.04 of the Ohio Revised Code, a demand for a money judgment usually entitles a plaintiff to a jury trial. However, a plaintiff has no right to a jury trial, however, for the resolution of equitable claims, and a trial court may itself resolve those claims. *Ohio Bd. of Dietetics v. Brown* (1993), 83 Ohio App.3d 242, 247, 614 N.E.2d 855. In an action seeking an injunction, there is no right to a jury trial because such an action is equitable in nature. See *State ex rel. Miller v. Anthony,* 72 Ohio St.3d 132, 1995-Ohio-39, 647 N.E.2d 1368. When a case presents both a legal and equitable claim for relief, and the money demand is "incidental and ancillary" to the equitable claim and can be awarded only if the equitable relief is granted first, then the case is predominantly an equitable action, for which no jury trial is required. *Murello Constr. Co. v. Citizens Home Savings Co.* (1985), 29 Ohio App.3d 333, 334, 505 N.E.2d 637 (holding that a jury trial was not required when the money demand, although specific, was "incidental and ancillary" to the equitable relief requested and would ripen only if equitable relief were granted);, citing *Pyromatics, Inc. v. Petruziello* (1983), 7 Ohio App.3d 131, 134, 454 N.E.2d 588.

{¶45} In the case sub judice, a right to a jury trial did not exist upon this type of action prior to the adoption of the Ohio Constitution of 1802. Actions for

the enforcement of water pollution control laws under R.C. Chapter 6109 did not exist at common law. See, for example, *State of Ohio ex rel., Betty Montgomery v. Portage Landfill and Development Co.* (June 30, 1999), Portage App. No. 98-P-0033, 1999 WL 454623, concerning R.C. Chapter 6111.[2] Therefore, Section 5, Article I of the Ohio Constitution does not preserve a right to a jury trial for the type of action filed against appellants.

{¶46} Moreover, upon our review, we find that the action instituted by the State of Ohio was primarily equitable in nature. In the case sub judice, the State of Ohio sought an injunction to prevent appellants from engaging in the same type of violations that they had been engaging in for a period of years. It is clear from the complaint that the State's goal in bringing this action was to ensure appellants' compliance with R.C. Chapter 6109 and any regulations adopted thereunder and to protect the public. The fact that the State also sought penalties under R.C. 6109.33 does not change our analysis. See *State of Ohio ex rel., Betty Montgomery v. Portage Landfill and Development Co.* (June 30, 1999), Portage App. No. 98-P-0033, 1999 WL 454623. In such case, the State sought both injunctive relief and civil penalties for violations of R.C. Chapter 6111. In holding that the appellants did not have a right to a jury trial, the

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[2] While Chapter 6109 concerns safe drinking water, Chapter 6111 addresses water pollution control.

court, in the *Portage Landfill* case, stated, in relevant part, as follows: "The action instituted by the state was for the enforcement of the laws contained in R.C. Chapters 3734 and 6111. The relief sought by the state was primarily equitable in nature, and the request for the imposition of civil penalties in the complaint did not convert the action into one for the recovery of money only with the concomitant right to a trial by jury. See, *e.g.*, *Nozik*, 1994 WL 613779, at 4 (wherein this court held that a request for civil penalties was incidental to the injunctive relief sought by the Ohio Environmental Protection Agency for alleged violations of R.C. Chapters 3734 and 6111)."[3] Id at 6. We find, in the case sub judice, that the claim for injunctive relief was predominant and that the claim for penalties was incidental to the same.

{¶47} Appellants' third assignment of error is, therefore, overruled.

IV

{¶48} Appellants, in their third assignment of error, maintain that the $300,000.00 in penalties that the trial court awarded to the Ohio EPA were excessive, arbitrary, in appropriate [sic] and in violation of appellants' due process rights. We disagree.

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[3] The complete citation for the *Nozik* case is *Mentor v. Nozik* (Sept. 23, 1994), Lake App. No. 93-L-130, 1994 WL 613779.

{¶49} R.C. 6109.33 states, in relevant part, as follows: "Any person who violates section 6109.31 of the Revised Code shall pay a civil penalty of not more than twenty-five thousand dollars for each violation, . . . " The trial court, in the case sub judice, ordered appellants Meadowlake Corporation and Meadowlake Ltd. to pay $300,000.00 "in view of their longstanding and intentional violations of R.C. Chapter 6109, the rules adopted under authority of R.C. 6109, and/or orders issued by the Director of the Ohio Environmental Protection Agency, . . . " The trial court ordered that Meadowlake Corporation and Meadowlake Ltd. were jointly and severally liable for the $300,000.00.

{¶50} Because of the mandatory language contained in R.C. 6109.33, a trial court has no discretion regarding whether or not to impose a civil penalty. See *State v. Tri-State Group, Inc.*, Belmont App. No. 03 BE 61, 2004-Ohio-4441 (construing R.C. 6111.09(A) which contains analogous language to R.C. 6109.33). The amount of the penalty imposed is within the discretion of the trial court based on the evidence in the case. Id. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable, *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶51} As noted by the court in *State v. Tri-State Group, Inc,* Belmont App. No. 03 BE 611, 2004-Ohio-4441, in determining the appropriate amount of a civil penalty, the trial court should consider the

following factors: 1) the harm or threat of harm posed to the environment by the violations 2) the level of recalcitrance, defiance, or indifference demonstrated by the violator of the law (the defendant's good or bad faith); 3) the economic benefit gained by the violation; and, 4) the extraordinary costs incurred in enforcement. Id at paragraph 104, citing to *State v. ex rel. Brown v. Dayton Malleable* (1982), 1 Ohio St.3d 151, 153, 438 N.E.2d 120. The court, in *Tri State Group, Inc.*, further noted that, in determining a penalty, the trial court must remember that because a civil penalty is an economic sanction designed to deter violations, the penalty must be large enough to hurt the offender. Id at paragraph 104.

{¶52} In the case sub judice, the trial court found that appellants had violated R.C Chapter 6109, rules adopted under authority of such Chapter, or orders issued by the Ohio EPA as follows:

{¶53} "a. By operating, from 1999 to May 30, 2006, a 'public water system' in Ohio, without a public water system license issued by the Director Ohio EPA;

{¶54} "b. By failing, from July 1998 to May 30, 2006, (Meadowlake Corporation) and from May 2001 to May 30, 2006, (Meadowlake Ltd.) to collect total coliform routine samples at sites which are representative of water throughout the public water distribution system located on the Meadowlake property according to a written sample siting plan;

{¶55} "c. By failing, from April 1995 through March 2001, (Meadowlake Corporation) to monitor for the presence of coliform bacteria once each calendar quarter in the Meadowlake property public water system;

{¶56} "d. By failing, from April 2001 to September 2005, (Meadowlake Corporation) and from May 2001 to September 2005, (Meadowlake Ltd.) to sample the Meadowlake public water system four times each month for total coliform bacteria;

{¶57} "e. By failing, from 1996 to 2000, (Meadowlake Corporation) to monitor annually to determine compliance with the maximum contaminant level for nitrate and from March 27, 2001 to August 2005, by failing to monitor monthly to determine compliance with the maximum contaminant level for nitrate and from March 27, 2001 to August 2005, by failing to monitor monthly to determine compliance with the maximum contaminant level for nitrate;

{¶58} "f. By failing, from May 2001 to August 2005, (Meadowlake Ltd.) to monitor monthly to determine compliance with the maximum contamination level for nitrate;

{¶59} "g. By failing, from March 27, 2001 to May 30, 2006 (Meadowlake Corporation) or from May 2001 to May 30, 2006 (Meadowlake Ltd.) to either install an approved disinfection and filtration treatment or in the alternative to provide water for the Meadowlake property public water system that would not be subject to the surface water treatment

requirements of O.A.C. Rule 3745-81-71 through 3745-81-75;

{¶60} "h. By failing, either classified as a ground water source or as using a surface water source, to issue a public notification of its/their failure to conduct quarterly or monthly total coliform routine monitoring of the Meadowlake property public water system – Meadowlake Corporation from April 1995 to May 30, 2006, and Meadowlake Ltd. From May 2001 to May 30, 2006;

{¶61} "i. By failing, either classified as a ground water source or as using a surface water source, to issue public notification of its/their failure to conduct annual or quarterly nitrate monitoring of the Meadowlake property public water system – Meadowlake Corporation from July 1966 to May 30, 2006, and Meadowlake Ltd. From May 2001 to May 30, 2006;

{¶62} "j. By having a well casing for the Meadowlake property public water system which terminates less than eight inches above finished grade of the land outside of the building in which the public water system source is located; the well is located in the basement of the former farmhouse and the well casing terminates more than eight inches below the outside ground level."

{¶63} The trial court, in its August 4, 2006, Judgment Entry, further noted that the total number of noncompliance day violations committed by appellants exceeded 1,000.

{¶64} While appellants argue that the penalties assessed by the trial court are excessive in light of the fact that no credible threat to the water supply at Meadowlake Golf & Swim existed and, therefore, there was no threat to public health, as noted by appellee, appellants failed to comply with the required sampling requirements. The trial court specifically found that appellant failed to complete the required monthly nitrate testing and the required four monthly coliform monitoring samples. Appellants have not challenged such findings on appeal. As noted by the court in the *Tri-State* case, when an entity, such as in the case sub judice, disregards the statutory scheme by failing to sample the water, the Ohio EPA cannot fully assess the threat of harm.

{¶65} Appellants further contend that the trial court should have considered, but failed to do so, appellants' financial ability to pay the penalty. Appellants note that, pursuant to the *Dayton Malleable* case, which is cited above, the size of a business and its ability to pay a fine is a "significant factor" to be considered in determining the amount of a penalty. According to appellants, because it is a small seasonable business, the amount of the penalty "goes beyond deterrence and amounts of the most severe form of punishment, bankruptcy of the Meadowlake Defendants."

{¶66} Appellants bore the burden of showing that the impact of a penalty would be ruinous or otherwise disabling. *United States v. Golf Water Park Co., Inc.* (S.D. Miss. 1998), 14 F.Supp.2d 854, 868.

At the trial in this matter, Phillip Barr testified with respect to the extent of appellants' business operations. While there was no testimony as to appellants' revenues, the burden was on appellants, through counsel, to present such evidence. Appellants, however, failed to do so.

{¶67} In addition, there was evidence before the trial court that appellants intentionally violated R.C. Chapter 6109 and that appellants' violations were longstanding. Some of appellants' violations date as far back as 1995. As noted by the trial court, appellants were repeatedly advised of the violations over the years and yet failed to remedy the same. The trial court, in its entry, noted that with respect to some of the violations, appellant had been notified monthly over a period of years. Moreover, at the May 30, 2006 trial in this matter, Holly Kaloz of the Ohio EPA testified, with respect to nitrate sampling that, Meadowlake was within the top ten in the State of Ohio with respect to non-compliance. In addition, while Meadowlake Corporation applied for and received license to operate a public water system for the years 1996 though 1999, after such dates, it failed to apply for or receive any licenses. As a result of appellants' violations, the State of Ohio was forced to file the case sub judice against appellant and incur the expenses of the same, including the expenses incurred during the first trial, which resulted in a mistrial, and the subsequent trial. In turn, appellants avoided the costs associated with coliform sampling and nitrate sampling by failing to conduct such sampling for over fifty (50) sampling periods.

{¶68} Moreover, while appellants contend the penalty imposed is excessive and thus violates the Eighth Amendment to the United States Constitution, the Eighth Amendment generally applies to criminal matters, not to civil matters. See *Dayton Malleable,* supra. at FN5, citing to *Ingraham v. Wright* (1977), 430 U.S. 651, 97 S.Ct. 1401.

{¶69} In short, we find that the trial court did not abuse its discretion in assessing a $300,000.00 penalty against appellants. The trial court's decision was not arbitrary, unreasonable or unconscionable based upon the record.

{¶70} Appellants' fourth assignment of error is, therefore, overruled.

{¶71} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Farmer, J. concur

/s/ Julie A. Edwards

/s/ William B. Hoffman

/s/ Sheila G. Farmer

JUDGES

JAE/0625

IN THE COURT OF APPEALS
FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO, ex rel. MARK DANN, ATTORNEY GENERAL OF OHIO	: JUDGMENT ENTRY
Plaintiff-Appellee	:
-vs-	:
MEADOWLAKE CORPORATION, et al.	: CASE NO.
Defendants-Appellants	: 2006 CA 00252

(Filed Dec. 17, 2007)

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed. Costs assessed to appellants.

/s/ Julie A. Edwards

/s/ William B. Hoffman

/s/ Sheila G. Farmer

JUDGES

THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO, ex rel. JIM PETRO, ATTORNEY GENERAL OF OHIO,	:	**CASE NO. 2004 CV 01672**
PLAINTIFF,	:	**JUDGE LILE (Assigned)**
v.	:	
MEADOWLAKE CORPORATION, et al.,	:	**JUDGMENT ENTRY** (Filed Aug. 4, 2006)
DEFENDANTS,	:	

This civil action came before the court for trial upon the Plaintiff's complaint, filed May 19, 2004, the Defendants' joint answer, filed June 10, 2004, and Plaintiff's motion for preliminary injunction, filed March 15, 2005. A counterclaim previously filed by the Defendants was dismissed by the court on November 23, 2004.

A jury trial to determine whether the Defendants were the owners or operators of a Public Water System, was begun on January 9, 2006 and was terminated on January 11, 2006, by declaration of mistrial. Thereafter, the matter was set for retrial and, upon further review of the Plaintiff's previously filed motions and memoranda to proceed in this matter without jury, the court determined that the matters before it in this action were not triable to a jury and the issues herein were ordered to proceed as a trial to the court on May 30, 2006.

Previously, on March 23, 2006, the court granted leave to Matthew Yackshaw, Esq., counsel for the Defendants, to withdraw as counsel for cause, namely that the Defendants had deliberately failed to make payment on their account and had failed to make any satisfactory provisions for payment on their substantial account balance due despite written and oral requests by counsel to do so. In the same entry, which was sent to all Defendants, the court advised the Defendants:

> **Therefore, the Defendants are ordered to immediately secure the representation of other counsel in order to proceed in this matter, or if they choose to waive the representation of counsel to understand that any non-attorney even though an officer of any of the Defendant corporations or an appointed agent of any of the Defendant corporations could not file pleadings, present further defense regarding the issue before the court, or otherwise represent the interests of the corporate defendants.**

Prior to the trial of May 30, 2006, no counsel entered appearance on behalf of the Defendants or requested a stay of proceedings. Following the trial, the court took the matter under advisement.

Findings of Fact

Upon the evidence presented, the court finds:

1. Defendants, Meadowlake Corporation and Meadowlake Ltd., invite the public to patronize a swimming pool, a golf course, snack bars and a restaurant, all of which are situated on the Defendants' property located at 1211 39th Street, NE, Canton, Ohio, hereafter referred to as the "Meadowlake property".

2. The Ohio Environmental Protection Agency ("Ohio EPA") determined, beginning in the year 1996, that Meadowlake Corporation owned and operated a "public water system" on the Meadowlake property. The Ohio EPA determined, effective May 2001, the onset of its legal existence, that Meadowlake Ltd. owned and operated a "public water system" on the Meadowlake property.

3. The determinations by the Ohio EPA that the Defendants own and operate a "public water system" at the 39th Street NE, Canton, Ohio, location have not been overturned pursuant to the laws of the State of Ohio.

4. The Defendant Meadowlake Corporation, in the name of Meadowlake Country Club, applied for a license to operate a "public water system" for the years 1996, 1997, and 1998 and was granted licences [sic] to operate a "public water system" on the Meadowlake property during those years. Neither

Meadowlake Corporation since 1999, nor Meadowlake Ltd. since May 2001, (the onset of its legal existence) have applied for or been granted a license to operate a "public water system".

5. On August 11, 1999, the Director of the Ohio Environmental Protection Agency ("Director Ohio EPA") issued a proposed action designating the public water system on the Meadowlake property as a source of water "under the influence of surface water". Meadowlake Corporation as the owner of the public water system received notice of the proposed action and its right to appeal such proposed action. The proposed action became final on September 27, 1999.

6. From March 27, 2001, to May 30, 2006 (1,890 days), Defendant, Meadowlake Corporation did not provide the necessary filtration treatment for the public water system on the Meadowlake property and has been advised monthly of such failure.

7. From May 2001, to May 30, 2006, (1,855 days) Defendant Meadowlake Ltd. did not provide the necessary filtration for the public water system on the Meadowlake property and has been advised monthly of such failure.

8. From March 27, 2001, to May 30, 2006 (1,890 days), Meadowlake Corporation did not issue required public notifications after being advised of its failure to provide surface water treatment.

9. From May 2001, to May 30, 2006, (1,855 days), Meadowlake Ltd. did not issue required public notifications after being advised of its failure to provide surface water treatment.

10. From April 2001 through October 2005, a total of 51 sampling periods, Meadowlake Corporation failed to complete the required four monthly coliform monitoring samples even though it was advised monthly of such failure.

11. From May 2001 to October, 2005, a total of 50 sampling periods, Meadowlake Ltd. failed to complete the required four monthly coliform monitoring samples even though it was advised monthly of such failure.

12. From April 2001, to October 2005, Meadowlake Corporation did not issue the required public notifications after being advised of its failure to provide coliform bacteria samples.

13. From May 2001, to October 2005, Defendant Meadowlake Ltd. did not issue the required public notifications after being advised of its failure to provide coliform bacteria samples.

14. From April 2001, to August 2005, a total of 52 sampling periods, Defendant Meadowlake Corporation failed to complete the required monthly nitrate sampling.

15. From May 2001, to August 2005, a total of 51 sampling periods, Defendant Meadowlake Ltd. failed to complete the required monthly nitrate sampling.

16. From April 2001, through October 2005, Meadowlake Corporation did not issue the required public notifications after being advised of its failure to complete monthly nitrate monitoring requirements.

17. From May 2001, to October 2005, Defendant Meadowlake Ltd. did not issue the required public notifications after being advised of its failure to complete monthly nitrate monitoring requirements.

18. From July 1998 to May 30, 2006, the Defendant Meadowlake Corporation failed to prepare and maintain a written sampling plan for the collection of total coliform routine samples at sites which are representative of water throughout the Meadowlake property public water system.

19. From May 2001 to May 30, 2006, the Defendant Meadowlake Ltd. failed to prepare and maintain a written sampling plan for the collection of total coliform routine samples at sites which are representative of water throughout the Meadowlake property public water system.

20. The well casing for the Meadowlake property public water system well, which is located in the basement of a former farmhouse on the Meadowlake property, terminates less

than eight inches above the finished grade of the land outside the farmhouse.

Conclusions of Law

1. Meadowlake Corporation and/or Meadowlake Ltd. own(s) and/or operate(s) a "public water system" as such is defined in R.C. 6109.01(A) and the Ohio Administrative Code (O.A.C.) 3745-81-01 (FFF).

2. The defendants, Meadowlake Corporation and/or Meadowlake Ltd. have violated provisions of R.C. Chapter 6109, rules adopted under authority of R.C. 6109, and/or orders issued by the Director of the Ohio Environmental Protection Agency, to wit:

a. By operating, from 1999 to May 30, 2006, a "public water system" in Ohio, without a public water system license issued by the Director Ohio EPA;

b. By failing, from July 1998 to May 30, 2006, (Meadowlake Corporation) and from May 2001 to May 30, 2006, (Meadowlake Ltd.) to collect total coliform routine samples at sites which are representative of water throughout the public water distribution system located on the Meadowlake property according to a written sample siting plan;

c. By failing, from April 1995 through March 2001, (Meadowlake Corporation) to monitor for the presence of coliform bacteria once each calendar quarter in the Meadowlake property public water system;

d. By failing, from April 2001 to September 2005, (Meadowlake Corporation) and from May 2001 to September 2005, (Meadowlake Ltd.) to sample the Meadowlake public water system four times each month for total coliform bacteria;

e. By failing, from 1996 to 2000, (Meadowlake Corporation) to monitor annually to determine compliance with the maximum contaminant level for nitrate and from March 27, 2001 to August 2005, by failing to monitor monthly to determine compliance with the maximum contaminant level for nitrate;

f. By failing, from May 2001 to August 2005, (Meadowlake Ltd.) to monitor monthly to determine compliance with the maximum contamination level for nitrate;

g. By failing, from March 27, 2001 to May 30, 2006 (Meadowlake Corporation) or from May 2001 to May 30, 2006 (Meadowlake Ltd.) to either install an approved disinfection and filtration treatment or in the alternative to provide water for the Meadowlake property public water system that would not be subject to the surface water treatment requirements of O.A.C. Rule 3745-81-71 through 3745-81-75;

h. By failing, either classified as a ground water source or as using a surface water source, to issue a public notification of its/their failure to conduct quarterly or monthly total coliform routine monitoring of

the Meadowlake property public water system – Meadowlake Corporation from April 1995 to May 30, 2006, and Meadowlake Ltd. from May 2001 to May 30, 2006;

i. By failing, either classified as a ground water source or as using a surface water source, to issue public notification of its/their failure to conduct annual or quarterly nitrate monitoring of the Meadowlake property public water system – Meadowlake Corporation from July 1966 to May 30, 2006, and Meadowlake Ltd. from May 2001 to May 30, 2006;

j. By having a well casing for the Meadowlake property public water system which terminates less than eight inches above finished grade of the land outside of the building in which the public water system source is located; the well is located in the basement of the former farmhouse and the well casing terminates more than eight inches below the outside ground level.

3. The law provides that no person shall violate any provision of R.C. chapter 6109, any rule adopted under it, or any order or term or condition of a license, license renewal, variance, or exemption granted by the director of environmental protection under it. Each day of noncompliance is a separate violation. (See R.C. § 6109.31).

4. The Director Ohio EPA is authorized to investigate or make inquiries into any suspected violation of R.C. § 6109.31. The attorney general is authorized to bring an action for injunction or other appropriate

action against any person violating or threatening to violate § 6109.31. Any final order of the director, the finding of the director, after hearing, is prima-facie evidence of the facts found therein. (See R.C. § 6109.32).

5. Any person who violates section 6109.31 of the Revised Code shall pay a civil penalty of not more than twenty-five thousand dollars for each violation . . . (See R.C. § 6109.33).

6. The number of noncompliance day-violations committed by the Defendants, Meadowlake Corporation and/or Meadowlake Ltd., exceeds one thousand (1,000) in number.

7. The Defendants' violations of R.C. chapter 6109, the rules adopted under the chapter, and orders issued by the Director Ohio EPA have been intentional.

Judgment

Upon the findings and conclusions made above, the court finds the issues herein in favor of the Plaintiffs and against the Defendants. It is Ordered, Decreed, and Adjudged, therefore:

1. The Defendants, Meadowlake Corporation and Meadowlake Ltd, which include entities or businesses carried on under the names of Meadowlake Golf & Swim, Meadowlake Country Club and/or Rafters Bar and Grille shall, within 30 days, obtain a public

water system license pursuant to R.C. §6109.21 and O.A.C. Rule 3745-84-01 and shall pay the required license fees, late fees and interest;

2. The Defendants, Meadowlake Corporation and Meadowlake Ltd, which include entities or businesses carried on under the names of Meadowlake Golf & Swim, Meadowlake Country Club and/or Rafters Bar and Grille, shall immediately comply with the written siting plan for the collection of total conform bacteria that was submitted to Ohio EPA on May 30, 2006;

3. The Defendants, Meadowlake Corporation and Meadowlake Ltd, which include entities or businesses carried on under the names of Meadowlake Golf & Swim, Meadowlake Country Club and/or Rafters Bar and Grille shall immediately monitor the water supplied by the Meadowlake "Public Water System" at least four times each month for the presence of coliform bacteria and comply with repeat monitoring and maximum contaminant level requirements in accordance with O.A.C. Rules 3745-81-14 and 3745-81-21 for as long as the Defendants or either of them continue(s) to use a surface water source. Should the Meadowlake "Public Water Source be redesignated by Ohio EPA as ground water, the Defendants shall monitor quarterly for total coliform bacteria and comply with repeat monitoring and maximum contaminant level requirement, in

accordance with O.A.C Rules 3745-81-14 and 3745-81-21;

4. The Defendants, Meadowlake Corporation and Meadowlake Ltd, which include entities or businesses carried on under the names of Meadowlake Golf & Swim, Meadowlake Country Club and/or Rafters Bar and Grille shall immediately monitor the water supplied by the Meadowlake "Public Water System" at least once each month for the presence of nitrate and comply with confirmation monitoring and maximum contaminant level requirements in accordance with O.A.C Rules 3745-81-11 and 3745-81-23 for as long as the Meadowlake "Public Water System" continues to use a surface water source. Should the Meadowlake "Public Water System" source be redesignated by Ohio EPA as ground water, the Defendants shall monitor for the presence of nitrate annually and comply with confirmation monitoring and maximum contaminate level requirements in accordance with O.A.C. Rules 3745-81-11 and 3745-81-23 and a schedule provided by Ohio EPA.

5. The Defendants, Meadowlake Corporation and Meadowlake Ltd, which include entities or businesses carried on under the names of Meadowlake Golf & Swim, Meadowlake Country Club and/or Rafters Bar and Grille shall, within 120 days, properly abandon the presently constituted farmhouse well and, in compliance with O.A.C. Rules 3745-81-71 through 3745-81-75, connect with an

approved water system: a) by repairing the well and obtaining written approval for its use from Ohio EPA, b) by abandoning the well and obtaining an Ohio EPA approved source of water for the public's consumption, c) by abandoning the well and hauling water approved by Ohio EPA, in writing, onto the premises, d) by abandoning the well and connecting to an Ohio EPA approved water system, or e) by installing an Ohio EPA approved surface water treatment system.

6. The Defendants, Meadowlake Corporation and Meadowlake Ltd, which include entities or businesses carried on under the names of Meadowlake Golf & Swim, Meadowlake Country Club and/or Rafters Bar and Grille shall, within 15 days, notify the public in accordance with O.A.C. Rules 3745-81-21, -23, -32 and -73, of the Defendants' failures to comply with the surface water treatment rules to date;

7. The Defendants, Meadowlake Corporation and Meadowlake Ltd., which include entities or businesses carried on under the names of Meadowlake Golf & Swim, Meadowlake Country Club and/or Rafters Bar and Grille shall, within 120 days, attain compliance with water well standards in accordance with R.C. § 6111.42 and O.A.C. Chapter 3745-9;

8. The Defendants, Meadowlake Corporation and Meadowlake Ltd., in view of their longstanding and intentional violations

of R.C. Chapter 6109, the rules adopted under authority of R.C. 6109, and/or orders issued by the Director of the Ohio Environmental Protection Agency, are ordered to pay a civil penalty of $300,000, for which amount judgment is granted in favor of the Plaintiff, State of Ohio, to be paid into the state treasury to the credit of the drinking water protection fund created in R.C. § 6109.30. Meadowlake Corporation and Meadowlake Ltd. shall be jointly and severally liable for such civil penalty;

9. The court does not find that attorney fees are available in this case in that pursuant to the general "American rule," the prevailing party cannot recover attorney fees as part of the cost of litigation in the absence of statutory authorization. See *Sorin v. Bd. of Edn.* (1976), 46 Ohio St.2d 177, 179. Had the legislature intended to authorize such additional assessment or penalty against a party, that authority would have been included in R.C § 6109.33;

10. It is Ordered that all costs incurred in this lawsuit shall be paid by the Defendants, Meadowlake Corporation and Meadowlake Ltd., for which amount they are jointly and severally liable.

ORDERED, ADJUDGED, AND DECREED.

/s/ Roger G. Lile
Roger G. Lile, Judge

cc: Gregory J Poulos, Esq., Assistant Attorney General
Lizbeth Brown, Esq., Assistant Attorney General
Law Offices of Robert E. Soles, Jr., Co., LPA
Robert E. Soles, Jr., Esq.
Kara Dodson, Esq.
Faith R. Dylewski, Esq.
Kevin C. Cox, Esq.

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO, ex rel. JIM PETRO, ATTORNEY GENERAL OF OHIO,	:	
PLAINTIFF,	:	**CASE NO. 2004 CV 01672**
v.	:	**JUDGMENT**
MEADOWLAKE CORPORATION, et al.,	:	**JUDGE LILE**
DEFENDANTS.	:	(Filed Aug. 1, 2006)

This action came before the court for consideration of the Motion For Evidentiary Hearing filed on behalf of the Defendants, Meadowlake Corporation and Meadowlake Ltd.

Being advised in the premises, the motion and briefs of counsel, the court does not find the Defendants' motion well taken and overrules the same. The Defendants, having been advised of the consequences of their failure to hire new counsel to appear at the May 30, 2006 trial, delayed such hiring themselves. The attorney, whom the Defendants state was unavailable to appear at the trial due to serious personal injuries, had never entered an appearance in this matter and was never counsel of record in the action. Prejudice to the Defendants, if any, was caused by their own acts. The Defendants here, in fact, are requesting a post-trial continuance of the matter.

The Court of Appeals for the Second Appellate District in Woods v. Woods (March 9, 1994), Montgomery App. No. 13487, unreported, stated:

> Understandably, parties have no absolute right to a continuance merely because of an unexplained change of counsel immediately preceding the time set for hearing of a cause. And by the same token, the mere failure of a party to employ counsel until just prior to the date set for trial is not an adequate ground for a continuance. Likewise, the discharge or withdrawal of counsel is not alone sufficient to support a motion for continuance.

The trial in this lawsuit which was assigned for trial in March 2006, was held on May 30, 2006. Thereafter the case was taken under advisement and final judgment in the matter is pending. For reasons noted above, Defendants' motion for a farther evidentiary hearing is overruled.

ORDERED and DECREED.

/s/ Roger G. Lile
Judge Roger G. Lile
Assigned

cc: Robert E. Soles, Jr.
Gregory J. Poulos, Esq.

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO, ex rel. JIM PETRO, ATTORNEY GENERAL OF OHIO	**CASE NO. 2004 CV 01672**
Plaintiff,	**JUDGE REINBOLD**
v.	**MOTION FOR EVIDENTARY [sic] HEARING**
MEADOWLAKE CORPORATION, et al.	(Filed Jul. 11, 2006)
Defendant.	

Defendants, Meadowlake Corporation and Meadowlake Ltd. (hereinafter collectively referred to as "Defendants" or "Meadowlake") hereby respectfully move this Court to grant an Order permitting Defendants to present evidence prior to the required post trial briefing in this matter. This Motion is not made for purpose of delay but rather to permit Defendants an opportunity to present evidence in this matter as the same opportunity was not available at trial due to circumstances beyond Defendant's control.

As the Court is aware, on March 9, 2006, this case was scheduled for trial to begin on May 30, 2006. On that same date, Defendant's counsel, Day Ketterer Ltd. and Matthew Yackshaw filed a Motion for Leave to Withdraw as Attorneys of Record for Defendants. On March 14, 2006, in response to attorney Yackshaw's Request to Withdraw, intervening Defendant, Roy Barr filed a Motion to Stay Further Proceedings

in order that Defendants could retain new counsel and adequately prepare for trial. Plaintiff objected to and moved to strike the pleading filed by Roy Barr as improper on the grounds that a non-attorney cannot represent corporate entities in Court.

On March 23, 2006, this Court ordered that the case would indeed proceed to trial on May 30, 2006. Defendants attempted to retain replacement counsel during this time, meeting with over 10 different attorneys, including Attorney Patrick DeBoer, Defendant's counsel for general corporate matters. See Affidavit of Roy Barr at ¶ 3, a true and accurate copy of which is attached hereto as **Exhibit A**. Unfortunately, a recent skiing accident had gravely injured Attorney DeBoer, leaving him unable to represent Defendants at the time of trial. (Barr Aff. ¶ 4.) Given the short timeframe and the complex environmental nature of the subject matter, Defendants were unable to retain replacement counsel in time for the May 30, 2006 trial. As unrepresented corporate entities, Defendants were unable to present evidence, cross examine witnesses, preserve errors or otherwise present or defend their position at trial, seriously prejudicing their interests. It is for this reason, Defendants, now having secured counsel, respectfully request a hearing to present evidence in this matter.

Respectfully Submitted,

LAW OFFICES OF ROBERT E. SOLES, JR., CO., LPA

/s/ Faith R. Dylewski

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CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 7th day of July 2006, to:

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/s/ Faith R. Dylewski
Counsel for Defendants

EXHIBIT A

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE OF OHIO, ex rel. JIM PETRO, ATTORNEY GENERAL OF OHIO	)	
Plaintiff,	)	**CASE NO. 2004 CV 01672**
v.	)	**JUDGE REINBOLD**
MEADOWLAKE CORPORATION, et al.	)	**AFFIDAVIT**
Defendant.	)	

STATE OF OHIO	:	
	:	SS:
COUNTY OF STARK	:	

I, Roy Barr, who being first duly sworn, deposes and state as follows:

1. At all relevant times I have been the Chief Executive Officer of Meadowlake Corporation and Meadowlake, Ltd., and I have personal knowledge of the facts contained herein.

2. At the time that Attorney Yackshaw informed Defendants that he would be withdrawing, I was unaware that Defendants could object to Mr. Yackshaw's withdraw [sic]. Additionally, I had concerns regarding Mr. Yackshaw's continued zealous representation of Defendants as Mr. Yackshaw had previously refused to do any further work on the matter.

3. Based upon Mr. Yackshaw's position, it was my belief at the time that Defendants would be better represented with different counsel. On behalf of Defendants, I immediately began contacting potential replacement counsel to represent Defendants in the approaching trial. Among the attorneys contacted were Patrick DeBoer, John Pierson, Larry Zink, Gerald Baker, Stanley Rubin, Patrick Cusma, Victor Marsh, Clay Keller, Daniel Warren, and Richard Sahli.

4. When I contacted Defendants' corporate attorney, Patrick DeBoer, I learned that he had recently been involved in a very serious skiing accident. As a result, Attorney DeBoer was not well enough to represent Defendants at the time of trial.

5. Until the Motion to Stay the Proceedings was denied, I was not aware that Defendants as corporate entities could not proceed at trial pro se if necessary.

Further Affiant sayeth naught.

/s/ Roy Barr
Roy Barr

Sworn to and subscribed in my presence this 6th day of July, 2006.

/s/ Faith R. Dylewski
Notary Public

[SEAL] FAITH RENEE DYLEWSKI
Attorney at Law
Notary Public, State of Ohio
My Commission
Has No Expiration
Section 147.03 R.C.

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. JIM PETRO, ATTORNEY GENERAL OF OHIO **Plaintiff-Appellee,** **v.** **MEADOWLAKE CORPORATION, et al.** **Defendants-Appellants.**	**CASE NO. 08-0247** **On Appeal from the Stark County Court of Appeals Fifth Appellate District** **Court of Appeals Case No. 2006 CA 00252**

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS

(Filed Jan. 31, 2008)

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[i] TABLE OF CONTENTS

Page

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION 1

STATEMENT OF THE CASE AND FACTS 4

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 8

Proposition of Law No. 1. Due process is violated when a corporate defendant is denied the opportunity to proffer evidence at a hearing, after having been precluded from participation at trial due to a lack of counsel 8

Proposition of Law No. 2. The award of an immense civil penalty in favor of the government without any consideration of the defendant's ability to pay has a sufficiently penal effect in violation of the Eighth Amendment's prohibition against excessive fines 9

Proposition of Law No. 3. A court must take into consideration the defendant's ability to pay a civil penalty when making its penalty determination 10

CONCLUSION 12

PROOF OF SERVICE 13

APPENDIX Appx. Page

Opinion of the Stark County Court of Appeals (December 17, 2007).....1

Judgment Entry of the Stark County Court of Appeals (December 17, 2007) 21

[1] EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents significant constitutional questions of law which are of great interest to the public. Meadowlake Corporation and Meadowlake LLC ("Appellants" or "Meadowlake Defendants") were not afforded due process and have been severely penalized in violation of the Excessive Fines Clause of the Eighth Amendment. As in the case at hand, violations of the Environmental Protection Agency's (EPA) regulations often can result in punitive sanctions, akin to criminal sanctions. For this reason, it is imperative that such defendants be afforded procedural due process. This case is of great public or general interest because the absolute right to procedural due process in a quasi-criminal proceeding is involved, and the denial of due process in such cases could result in governmental abuses of power.

Appellants in this matter were caught in an untenable position when their previous counsel withdrew before the trial; without counsel they could not move to continue the trial, and without a continuance

they could not participate at trial. It is crucial that corporate entities be afforded the opportunity to obtain new counsel when the corporation's counsel withdraws prior to trial because corporate entities cannot proceed with the defense of a civil action without representation by counsel, *Gueli v. David L. Carter Productions, Inc.*, (July 29, 1982), 10th Dist. No. 82AP-249. The opportunity to meaningfully participate at trial in a matter that involves substantial governmentally imposed sanctions, is an elemental requirement of due process. The unsupported denial of Appellants' Motion for Evidentiary Hearing was arbitrary, capricious and in violation of the Appellants' Due Process rights. By its cursory ruling affirming the denial of Appellants' request for an evidentiary hearing, the court of appeals ratifies the very governmental overreaching that can occur, and in fact has occurred, in the absence of due process protections.

[2] The court of appeals held that "it would be patently unfair to allow Appellants to, in effect, participate in the trial by submitting evidence after the fact." On the contrary, the patent unfairness arose when Appellants were denied the opportunity to present any defense. The denial of the Appellants' Motion for Evidentiary Hearing foreclosed any opportunity to remedy the injustice that was caused by the Appellants' inability to participate in the trial.

This case also presents the Court with the opportunity to clarify and define the implications of the Excessive Fines Clause of the Ninth Amendment of

the Ohio Constitution and the Eighth Amendment of the United States Constitution in cases in which the State is awarded excessive civil penalties. This issue is of great public or general interest due to the quasi-criminal nature of such a severe sanction when imposed by the government, and the fact that Ohio district courts are in conflict on this issue. The Fifth District Court of Appeals perfunctory dismissal of the applicability of the Excessive Fines Clause to civil actions is in conflict with the First District Court of Appeals holding in *Allen v. Niehaus*, 1st Dist. Nos. C-000213 & C-000235, 2001-Ohio-4021, in which that court held that the Ohio legislature's discretion to punish is substantively limited by the Fourteenth Amendment's Due Process Clause, which makes the Eighth Amendment's prohibition against excessive fines applicable to the states, and prohibits states from imposing grossly excessive punishments on tortfeasors. It is critical that this Court settle the direct conflict between the district courts on this issue which implicates fundamental rights.

Pursuant to the U.S. EPA's Civil Penalty Policy, the factors that are to be considered in assessing a penalty in order to deter future violations include: (1) the defendant's good or bad faith; (2) the defendant's financial gain attributable to the violations; and (3) the environmental harm resulting from the violations. *Brown v. Howard* (1981), 3 Ohio App.3d 189, 191, 3 O.B.R. [3] 216, 444 N.E.2d 469. The size of the business is a factor that is also to be considered. *Brown v. Dayton Malleable Iron* (1982), 1 Ohio St. 3d

151; 1 O.B.R. 185, 438 N.E.2d 120. Additionally, the defendant's ability to pay is a "significant factor" that is necessary to consider in making any penalty determination. Id. The lower courts' failure to even consider any evidence with respect to the Appellants' financial ability to pay, resulted in a grossly excessive penalty in violation of the Excessive Fines Clause of the U.S Constitution and the Ohio Constitution. The court of appeals cursory dismissal of the applicability of the Excessive Fines Clause in the ease at hand is in direct conflict with other Ohio district courts and is a matter of great general and public interest that must be resolved.

In this case, there was no evidence presented that Meadowlake Defendants gained financially, and therefore this factor could not have been considered by the trial court. Similarly, there was no evidence presented regarding the Meadowlake Defendants' revenue, therefore the court could not have taken this "significant factor" into consideration. If the true purpose of a civil penalty is deterrence and not punishment, it was reversible error for the court to refuse to assess the appropriateness of the proposed penalty in light of the Meadowlake Defendants' financial condition. The court of appeals condoned the trial court's extreme civil penalty award which merely adopted the arbitrarily recommended penalty proposed by the EPA without any consideration of the size of the businesses affected. Clearly a penalty of $300,000.00 assessed against a small seasonal business of this nature goes beyond deterrence and will

exact the most severe punishment – bankruptcy of the businesses.

This Court must grant jurisdiction to hear this case and review the erroneous decision of the court of appeals in order to clarify the State's position with respect to the application of the Excessive Fines Clause to the award of extreme civil penalties by the State, and to prevent [4] selective or retaliatory governmental sanctions from being imposed without procedural due process protections.

STATEMENT OF THE CASE AND FACTS

This is not a case involving acts of pollution, but rather this case revolves around records violations and technical omissions stemming from Meadowlake Defendants ongoing dispute with the EPA regarding whether it is in fact a public water system subject to regulation.

As background information, Meadowlake Golf and Swim Club is operated by Defendant, Meadowlake Ltd.; Defendant, Meadowlake Corporation, is the holding company that owns the land on which the Club and golf course are located. (Tr. p. 6). There are two separate wells that service the property: a hard water well used exclusively for irrigation of the golf course, and a separate soft water well that services the Club and the Barr family residence that is also located on the property. (Tr. p.54; Plaintiff's Trial Exh. 43).

In April 28, 1995, the Ohio EPA requested that Defendant obtain a copy of the well log so that the EPA had adequate background information on the well. (Plaintiff's Trial Exh. 60). Meadowlake Defendants contacted ODNR requesting any available information on their Well. (Plaintiff's Trial Exh. 45). Because no well log was required at the time the Well was drilled, Appellants were told that an affidavit of the well driller would suffice. However, before the affidavit could be obtained, EPA arbitrarily reclassified the well as ground water under the influence of surface water. Meadowlake Defendants subsequently obtained and provided to the EPA an affidavit from the well driller, who affirmed that the well was cased to a depth of 180 feet. (Tr. pp. 293, 297).

Since the Ohio Environmental Protection Agency's ("EPA") implementation of well classification requirements, the Well source classification had been "Ground Water." In August [5] 1999, the EPA arbitrarily changed the designation of the well to "Under the Influence of Surface Water". (Plaintiff's Trial Exh. 99). This change in designation was made without any evidence of bacteria intrusion into the well, and without any change in circumstances surrounding the well. (Tr. p 272). It is from this reclassification of the Well, which the violations in this matter stem. Pursuant to the reclassification, the EPA requires that Meadowlake Defendants conduct four total coliform tests and one test for nitrates per month. (Tr. pp. 59-61). Previously, Meadowlake had

been conducting quarterly tests for total coliform and annual tests for nitrates, with no failed tests.

The Club is a small facility that operates most activities only seasonally. David Bowland of the EPA testified that the Meadowlake Defendant's are not a classified public water system because they do not serve enough people. (Tr. p. 37).

The State's evidence was contradictory; however Appellants were unable to illuminate this fact due to the denial of the opportunity to present evidence and cross examine witnesses at trial. During the trial, Mr. Bowland testified that the well was below grade and therefore potentially subject to flooding. (Tr. p. 66). This testimony was contrary to Mr. Bowland's conclusions in the June 30, 1998 well survey that he conducted, in which he concluded that the well cap, drainage, and isolation of the well were all acceptable, and further concluded that the casing height of the Well terminated eight inches above grade. In follow-up letter of July 9, 1998, the Ohio EPA concluded that " . . . this well terminates sufficiently above surrounding grade to reasonably preclude the possibility of the well being flooded." At that time the EPA's concern was that a second well was connected to the water distribution system for use as emergency backup. The EPA indicated that if the second well was disconnected, and four calendar quarters of coliform samples indicated that the water was total coliform-negative, the well could be re-[6]designated as ground water. The emergency well had in fact been disconnected in the 1970's and the EPA was advised

of such on numerous occasions. Despite acknowledging that the emergency backup well was discontinued, and that the total conform tests continued to be negative, the EPA nevertheless re-designated the well classification.

In August 1999, the EPA informed Mr. Roy Barr by designation letter that the Well was re-designated as "ground water under the direct influence of surface water." (Plaintiff's Trial Exh. 57.) After receipt of the designation letter, Meadowlake Defendants took reasonable steps toward obtaining city water from the City of Canton. Ultimately, Meadowlake Defendants were unsuccessful in procuring city water. Because the Well had not been abandoned or updated, nor an approved water filtration system constructed and installed as of April 2001, Meadowlake Defendants were considered to be in violation. In May 2002, the Director of the EPA issued unilateral administrative findings and orders finding that Roy Barr dba Meadowlake Golf & Swim, was in violation of Revised Code Chapter 6109. (Tr. p. 288.) Mr. Roy Barr filed a Notice of Appeal challenging the Director's unilateral administrative findings and orders, commencing a case in the Environmental Review Appeals Commission ("ERAC"). On September 23, 2003, one week before the appeal before ERAC was to begin, the Director revoked his unilateral administrative findings and orders. ERAC dismissed Mr. Barr's pending appeal as moot. The revocation of the Director's findings and orders and the subsequent dismissal of Mr. Barr's appeal as moot, led the Meadowlake Defendants to

believe that their public water system designation, and the resulting notices of violations, were retracted.

On May 19, 2004, the State of Ohio filed a civil complaint, alleging that Meadowlake Defendants owned and operated a public water system, and were in violation for not having a license, failing to sample the water, and for not posting notice. (Tr. p. 7). On March 23, 2006, [7] the trial court granted Meadowlake Defendants' attorney leave to withdraw from the case, due to Meadowlake Defendants inability to timely pay their legal fees. Meadowlake Defendants were unsuccessful in retaining replacement counsel prior to the trial.

The trial went forward on May 30, 2006, and Meadowlake Defendants were unable to cross examine Plaintiff's witnesses, offer, evidence, make objections or otherwise participate or defend themselves in the proceedings. Subsequently, in late June 2006, Meadowlake Defendants retained replacement counsel. On July 11, 2006, Meadowlake Defendants, by and through counsel, moved the trial court for an evidentiary hearing in order to present evidence on the record. Meadowlake Defendants Motion was summarily denied on August 1, 2006. On August 4, 2006, the final judgment entry was entered, which Meadowlake Defendants appealed to the Fifth District Court of Appeals.

[8] ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1

Due process is violated when a corporate defendant is denied the opportunity to proffer evidence at a hearing, after having been precluded from participation at trial due to a lack of counsel.

Due process requires that a party whose rights are sought to be affected be afforded a full hearing with the opportunity to introduce evidence on one's behalf and have judicial findings based upon it. *Jennings v. Mahoney* (1971), 404 U.S. 25, 26, 92 S. Ct. 180, 30 L. Ed.2d 146; *City of Maumee* (January 16, 1987), 6th Dist. No. L-86-168. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Sutton v. Schregardus* (1994), 94 Ohio App.3d 213, 216, 640 N.E.2d 581. Due process implies the right to contradict by proof every material fact which hears on the question of the rights involved. *Jennings v. Mahoney.* There is no hearing in the constitutional sense where the party is not given a meaningful opportunity to test, explain, or refute evidence. Id. at 26, 92 S. Ct. 180, 30 L. Ed.2d 146, *Jenkins v. McKeithen,* (1969), 395 U.S. 411, 428, 89 S. Ct. 1843; 23 L. Ed. 2d 404. The right to present evidence is essential to a fair hearing required by the Due Process Clause. *Jenkins v. McKeithen,* (1969), 395 U.S. 411, 429, 89 S. Ct. 1843; 23 L. Ed. 2d 404.

The appellate court stated that "as an initial matter, we note that appellants never filed a written motion for continuance of the May 30, 2006 trial." The court could not have considered such a motion even if the Appellants had so moved, because as unrepresented corporate defendants, the trial court could not have entertained the motion. Ohio Revised Code Section 4705.01 prohibits anyone from practicing law or commencing or defending an action in which he or she is not a party concerned unless he or she has been admitted to the bar by order of the Supreme Court of Ohio. Furthermore, a corporation cannot maintain litigation or appear in Court through an officer of the corporation or an [9] appointed agent who is not admitted to the practice of law. *Union Savings Assn. The Homeowners Aid* (1970), 23 Ohio St. 2d 60, 262, N.E. 2d 558, 52 Ohio Op. 2d 329, syllabus of the Court.

Proposition of Law No. 2

The award of an immense civil penalty in favor of the government without any consideration of the defendant's ability to pay has a sufficiently penal effect in violation of the Eighth Amendment's prohibition against excessive fines.

Large civil penalty awards purport to deter wrongful acts by a defendant. Although civil penalty statutes are not labeled as "criminal" by the State, when they in practical effect punish the defendant,

they are sufficiently analogous to criminal punishments to justify application of the Eighth Amendment. See *Cooper Indus. V. Leatherman Tool Group, Inc.* 532 U.S. 408, 432, 123 S.Ct 1513. In this case, the appellate court particularly noted that the "penalty must be large enough to hurt the offender." This statement contradicts this Courts' holding in *Brown v. Dayton Malleable Iron,* which stated that the purpose of a civil penalty is deterrence, not punishment. (1982), 1 Ohio St. 3d 151, 159; 1 O.B.R. 185, 438 N.E.2d 120. Clearly, if the penalty must hurt the offender, then the civil penalty is in fact punishment. Moreover, the very term "penalty" by its own definition means punishment. If a civil penalty has the purpose of retribution and deterrence, these are the very same purposes that underlie every criminal sanction. As Justice Stevens stated "[t]he fact that part of the award in this case is payable to the State lends further support to my conclusion that it should be treated as the functional equivalent of a criminal sanction." *Philip Morris USA v. Williams* (2007) 127 S.Ct 1057, 166 L.Ed.2d 940 (Stevens, J., dissenting)

The Ohio legislature's discretion to punish is substantively limited by the Fourteenth Amendment's Due Process Clause, which makes the Eighth Amendment's prohibition against excessive fines applicable to the states, and prohibits states from imposing grossly excessive [10] punishments on tortfeasors. *Allen v. Niehaus,* 1st Dist. Nos. C-000213 & C-000235, 2001-Ohio-4021. Additionally, the Ninth Amendment to Ohio's Constitution contains the

identical prohibition. The Eighth Amendment Excessive Fines Clause, although previously held inapplicable in cases of punitive damages involving private parties, is implicated in cases in which a monetary award is paid directly to the State or a state agency. Since the *Brown v. Dayton Malleable Iron* holding of this Court, to which the Fifth District Court of Appeals made reference, the U.S. Supreme Court has revisited the issue of the applicability of the Eighth Amendment Excessive Fines Clause to monetary awards, in particular, awards payable to the State. Notably, the U.S. Supreme Court in *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.* (1989), 492 U.S. 257, 265, 109 S.Ct 2909, examined the scope and origins of the excessive fines clause, finding that the excessive fines clause was intended to limit those fines imposed by and payable to the government.

As previously noted, this court has stated that the purpose of a civil penalty is deterrence, not punishment. *Dayton Malleable Iron,* 1 Ohio St.3d at 159, 1 O.B.R. 185, 438 N.E.2d 120. In order for this to hold true, the defendant's income and ability to pay must be considered. Moreover, the defendant's ability to pay is a ***"significant factor"*** that is ***necessary*** to consider in making any penalty determination. Id. The failure of the court of appeals to require this inquiry, and its perfunctory approval of the excessive penalty award was arbitrary, capricious and not in accordance with law.

Proposition of Law No. 3

A court must take into consideration the defendant's ability to pay a civil penalty when making its penalty determination.

The court of appeals relied exclusively on *U.S. v. Gulf Park Water Co., Inc.* 14 F.Supp.2d 854 (S.D.Miss.,1998), a case involving violations of the Clean Water Act, for the [11] proposition that the burden to show mitigating evidence of the ruinous effect of the sizable penalty lies with the defendants. However, the court in that case actually engaged in an analysis of the economic benefit gained by Gulf Park Water Co.'s non-compliance and the defendant's financial condition. On the contrary, in the case at hand, the trial court conducted no analysis of any kind with respect to any economic benefit and heard no evidence regarding the financial status of the Appellants.

Notably, in *U.S. v. Gulf Park Water Co., Inc.*, both the government and the defendants introduced expert testimony regarding the defendant's ability to pay. Although the court held that the burden was on the defendants to produce mitigating evidence, the initial burden was on the State to produce evidence justifying the initial penalty determination. Only when the court has considered all of the required factors, which include particularly the defendants ability to pay, does the burden shift to the Defendants to affirmatively show mitigating factors. If the court has made no meaningful consideration of the Defendant's

ability to pay, or in the case at hand has heard no evidence at all on the matter, the determination of the penalty has no justification. The court in *Gulf Park Water Co.* went so far as to appoint a special master to study the ability to pay issue in order to shed further light on the financial evidence presented at trial prior to rendering its decision. 14 F.Supp.2d at 867. The facts of that case are far different than those present in this matter.

The assessment of a $300,000.00 civil penalty in the absence of any evidence that the same was appropriate in light of the Appellants' ability to pay, was arbitrary, capricious, and otherwise not in accordance with law. The court of appeals reasoning improperly shifted the burden to Appellants before the State had presented any evidence as to required elements for [12] which it bore the burden of proof.

CONCLUSION

The court of appeals decision affirming the trial court's award of civil penalties in the amount of $300,000.00 is arbitrary and excessive and in violation of the Excessive Fines Clause in light of the circumstances in this matter, and the recent recognition by justices of the United States Supreme Court and Ohio's First District Court of Appeals. The court of appeals did not utilize any consideration of Appellants' size and financial status which are critical factors in such a determination. The trial court's

denial of Appellants Motion for an evidentiary hearing was arbitrary and unreasonable in light of the compelling due process concerns.

For the reasons stated above, this case involves matters of public and great general interest and a substantial constitutional question. The Appellants respectfully request that this Court accept jurisdiction in this case so that the important issues presented here will be reviewed on the merits.

Respectfully Submitted,

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[13] **CERTIFICATE OF SERVICE**

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for appellees, Marc Dann, Attorney General of Ohio, this 30th day of January, 2008 at the following address:

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/s/ Faith R. Dylewski
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COUNSEL FOR APPELLANTS

IN THE COURT OF APPEALS
FIFTH APPELLATE JUDICIAL DISTRICT
STARK COUNTY, OHIO

STATE OF OHIO, ex rel. JIM PETRO, ATTORNEY GENERAL OF OHIO **Plaintiff-Appellee,** **v.** **MEADOWLAKE CORPORATION, et al.** **Defendants-Appellants.**	**CASE NO. 2006 CA 00252** **On Appeal from the Stark County Court of Common Pleas, Case No. 2004CV01672**

BRIEF FOR DEFENDANTS-APPELLANTS, MEADOWLAKE CORPORATION AND MEADOWLAKE LIMITED, LLC

(Filed Dec. 5, 2006)

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[i] TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES	iii
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	6
ASSIGNMENT OF ERROR NUMBER ONE	6
THE TRIAL COURT ERRED BY PROCEEDING TO TRIAL ON MAY 30, 2006, WITH THE KNOWLEDGE THAT MEADOWLAKE DEFENDANTS WERE UNREPRESENTED BY COUNSEL FOR REASONS BEYOND THEIR CONTROL.	
ASSIGNMENT OF ERROR NUMBER TWO	8
THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION FOR EVIDENTIARY HEARING THEREBY DENYING APPELLANTS THE OPPORTUNITY TO PROFFER EVIDENCE, CROSS EXAMINE WITNESSES, PRESERVE ERRORS, OR OTHERWISE DEFEND THEIR POSITION.	
ASSIGNMENT OF ERROR NUMBER THREE	9
THE TRIAL COURT ERRED BY DENYING APPELLANT'S DEMAND FOR JURY TRIAL.	

ASSIGNMENT OF ERROR NUMBER FOUR..... 13

THE PENALTIES THAT THE TRIAL COURT AWARDED TO THE OHIO EPA ARE EXCESSIVE, ARBITRARY, INAPPROPRIATE, AND IN VIOLATION OF APPELLANTS' DUE PROCESS RIGHTS.

CONCLUSION..... 18

PROOF OF SERVICE..... 19

APPENDIX..... 20

[ii] **TABLE OF AUTHORITIES**

Cases

BMW of N. Am. v. Gore (1996), 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed.2d. 809 17

Brown v. Dayton Malleable Iron (1982), 1 Ohio St. 3d 151; 1 O.B.R. 185, 438 N.E.2d 120 .....15, 16

Brown v. Howard (1981), 3 Ohio App.3d 189, 3 O.B.R. 216, 444 N.E.2d 469 16

City of Maumee (January 16, 1987), 6th Dist. No. L-86-168 8

City of Mentor v. Nozik (September 23, 1994), 11th Dist. No. 93-L-130.....10

Dalton v. The Cleveland Elec. Illuminating Co.. (1919), 30 Ohio C.A. 24 9

Drake v. East Cleveland (1920), 101 Ohio St. 111, 127 N.E. 469 10

Gueli v. David L. Carter Productions, Inc., (July 29, 1982), 10th Dist. No. 82AF-249.....6

Jenkins v. McKeithen, Governor of Louisiana, et al. (1969), 395 U.S. 411, 89 S. Ct. 1843; 23 L. Ed. 2d 404 8

Jennings v. Mahoney (1971), 404 U.S. 25, 92 S. Ct. 180, 30 L. Ed.2d 146 8

MacKenzie v. Stuber (1929), 119 Ohio St. 588, 7 Ohio L. Avs. 109, 165 N.E. 296 9

Metaxas v. General Motors Corp. (March 25, 1988), 11th Dist. No. 3912 6

Prairie Twp. Bd. of Trustees vs. Stickles (February 3, 1994), Franklin App. No. 93 Ap-824.....10

Raskow v. Fortner (April 15, 1998), 9th Dist. No. 18399.....10, 11

Statutes

R.C. 6109.31.....11

R.C. 6109.32.....11

R.C. 6109.33.....10, 11

[iii] **STATEMENT OF THE ISSUES**

ASSIGNMENT OF ERROR NUMBER ONE

1. Whether Meadowlake Defendants as corporate entities were entitled to a continuance of the trial in order to procure replacement counsel.

2. Whether Meadowlake Defendants were unfairly prejudiced by the trial court's action in proceeding with the May 30, 2006 trial.

ASSIGNMENT OF ERROR NUMBER TWO

1. Whether the Meadowlake Defendants were denied due process by the trial courts denial of Defendants' Motion for Evidentiary Hearing.

ASSIGNMENT OF ERROR NUMBER THREE

1. Whether the civil penalties awarded to Plaintiff pursuant to R.C. 6109.33, could have been awarded independently of the injunctive relief granted pursuant to 6109.32.

2. Whether the trial court made any independent factual determination regarding whether the Meadowlake Defendants each own or operate a public water system, outside of adopting the EPA's determination.

ASSIGNMENT OF ERROR NUMBER FOUR

1. Whether the trial court took into consideration the size and financial status of Meadowlake Defendants in determining the civil penalty award.

2. Whether the trial court took into consideration the harm, or lack thereof, caused by Meadowlake Defendants when assessing civil penalties.

[1] STATEMENT OF THE CASE AND FACTS

What is now the Meadowlake Golf and Swim Club ("the Club") started as a nine hole golf course in

the spring of 1963. (Plaintiff's Trial Ex. 2). Prior to the construction of the golf course, the Barr family operated a dairy farm on the property. (Plaintiffs Trial Ex. 2). The existing dairy barn was converted into the clubhouse that is still used today, (Plaintiff's Trial Ex. 2). Currently, Meadowlake Golf and Swim Club is operated by Defendant, Meadowlake Ltd.; Defendant, Meadowlake Corporation, is the holding company that owns the land on which the Club and golf course are located. (hereinafter collectively referred to as "Meadowlake Defendants" or "Appellants") (Testimony of Philip Barr, p. 6). There are two separate wells that service the property: a hard water well used exclusively for irrigation of the golf course, and a separate soft water well that services the Club and the Barr family residence that is also located on the property. (Trial Trans. p.54; Plaintiff's Trial Exh. 43). The soft water well at issue in this matter (the "Well"), was drilled prior to the time that the Ohio Department of Natural Resources ("ODNR") maintained well drilling logs.

In April 28, 1995, the Ohio EPA requested that Defendant obtain a copy of the well log so that the EPA had adequate background information on the well. (Plaintiff's Trial Exh. 60). The letter went on to state that if the well log could not be located, the well driller should be instructed to contact the EPA, (Plaintiff's Trial Exh. 60) Meadowlake Defendants contacted ODNR requesting any available information on their Well. (Plaintiff's Trial Exh. 45). Because no well log was required at the time the Well was

drilled, Defendants were told that an affidavit of the well driller would suffice. However, before the affidavit could be obtained, EPA reclassified the well as ground water under the influence of surface water. Meadowlake Defendants subsequently obtained and provided to the EPA an affidavit from the well driller, Mr. George Martin, who affirmed that the well was cased to a depth of 180 feet. (Testimony of David Bowland pp. 293, 297).

[2] Since the Ohio Environmental Protection Agency's ("EPA") implementation of well classification requirements, the Well source classification had been "Ground Water." In August 1999, the EPA arbitrarily changed the designation of the well to "Under the Influence of Surface Water." (See letter of August 11, 1999, Plaintiff's Trial Exh. 99). This change in designation was made without any evidence of bacteria intrusion into the well, and without any change in circumstances surrounding the well. (Testimony of David Bowland, p 272). It is from this re-classification of the Well, that many of the underlying violations of this current litigation stem. The EPA contends that each day Appellants continue to operate without a reclassification of the water well to ground water they are in violation, unless the Club obtains water from a new source, or installs a water treatment plant. The water treatment required would be, in the words of EPA representative David Bowland, "a far more sophisticated system" analogous to the water treatment facilities in the City of Alliance. (Trial Trans. p. 62). Additionally, pursuant to the reclassification,

the EPA requires that Meadowlake Defendants conduct four total coliform tests and one test for nitrates per month. (Trial Trans. pp. 59-61). Previously, Meadowlake had been conducting quarterly tests for total coliform and annual tests for nitrates, with no failed tests. In the time since the well was classified as under the influence of surface water, Meadowlake Defendants have taken numerous steps toward reclassifying the well, or obtaining water from alternative sources, unfortunately to no avail. Furthermore, Appellants dispute that the Club falls within the definition of a public water system, the key issue in this case.

The Club is a small facility that operates most activities only seasonally. David Bowland of the EPA testified that the Meadowlake Defendant's are not a classified public water system because they do not serve enough people. (Trial Trans. P. 37). The smallest classification is a Class A, which is for systems which serve at least 250 people per day. (Trial Trans. P. 37). The [3] City of Alliance, by comparison services approximately 25,000 people. (Trial Trans. p. 40).

David Bowland testified that the well was below grade and therefore potentially subject to flooding. (Trial Trans. p. 66). This testimony is contrary to Mr. Bowland's conclusions in the June 30, 1998 well survey that he conducted with Edward Conlin. (See Well Survey of 6-30-98, attached hereto as **Exhibit A.**) In that survey, Mr. Bowland and Mr. Conlin concluded that the well cap, drainage, and isolation of the well were all acceptable, and further concluded

that the casing height of the Well terminated eight inches above grade. In a follow-up letter of July 9, 1998, Mr. Conlin further stated, "Excluding the elevation of the knoll, Mr. Bowland and I estimate that this well terminates sufficiently above surrounding grade to reasonably preclude the possibility of the well being flooded." (See July 9, 1998 letter attached hereto as **Exhibit B**.) At that time the EPA's concern was that a second well was connected to the water distribution system for use as emergency backup. The EPA indicated that if the second well was disconnected, and four calendar quarters of coliform samples indicated that the water was total coliform-negative, the well could be designated as ground water. The emergency well had in fact been disconnected in the 1970's and the EPA was advised of such on numerous occasions. (See Plaintiff's Trial Exh. 44, noting that the emergency hard water well was disconnected from the system.) Despite acknowledging that the emergency backup well was discontinued, and that the total coliform tests continued to be negative, the EPA nevertheless re-designated the well classification.

In August 1999, the EPA informed Mr. Roy Barr by designation letter that the Well was re-designated as "ground water under the direct influence of surface water," (Plaintiff's Trial Exh. 57.) After receipt of the designation letter, Meadowlake Defendants took reasonable steps toward obtaining city water from the City of Canton. (See Mr. Roy Barr letters of September 26, [4] 2001 and April 12, 2002, attached hereto

as **Exhibit C**). Ultimately, Meadowlake Defendants were unsuccessful in procuring city water. Because the Well had not been abandoned and a water treatment plant had not been constructed and installed as of April 2001, Meadowlake Defendants were considered to be in violation. In May 2002, the Director of the EPA issued unilateral administrative findings and orders finding that Roy Barr dba Meadowlake Golf & Swim was in violation of Revised Code Chapter 6109. (Testimony of David Bowland at p. 288.) Mr. Roy Barr filed a Notice of Appeal challenging the Director's unilateral administrative findings and orders, commencing a case in the Environmental Review Appeals Commission ("ERAC"). On September 23, 2003, one week before the appeal before ERAC was to begin, the Director revoked his unilateral administrative findings and orders. Plaintiff moved to dismiss Mr. Barr's pending appeal as moot, which Motion was granted on October 22, 2003. The revocation of the Director's findings and orders and the subsequent dismissal of Mr. Barr's appeal as moot, lead the Meadowlake Defendants to believe that their public water system designation, and the resulting notices of violations, were retracted.

On May 19, 2004, the State of Ohio filed the underlying complaint in this matter, alleging that Meadowlake Defendants owned and operated a public water system, and were in violation for not having a license, failing to sample the water, and for not posting notice. (Trial Trans. p. 7; See also Complaint). Originally the matter was set for jury trial, but after

the trial court declared a mistrial in the first trial in January 2006, the Court reconsidered and granted Plaintiff's previously filed motion to proceed in the absence of a jury. (See Order of May 19, 2006, attached hereto as **Exhibit D**.) The second trial was scheduled to begin May 30, 2006. On March 23, 2006, the Court granted attorney Matthew Yackshaw, counsel for Meadowlake Defendants at the time, leave to withdraw from the case, due to Appellants having been behind in [5] their payment of legal fees.

After Mr. Yackshaw's withdraw [sic], Meadowlake Defendants contacted Attorney Patrick DeBoer regarding potential representation. (See Affidavit of D. Patrick DeBoer attached hereto as **Exhibit E**.) On or about April 18, 2006, Attorney DeBoer received grave injuries as a result of a serious skiing accident, and was physically unable to represent Meadowlake Defendants at the May 30, 2006 trial. (DeBoer Aff. at ¶ 3.) Attorney DeBoer called the court to inquire as to the possibility of obtaining a continuance of the trial date. (DeBoer Aff. at ¶ 3; Transcript of proceedings at p. 11.) When told that a grant of such a motion was doubtful, and knowing that he was physically unable to proceed with the trial as scheduled, Attorney DeBoer declined to file a Notice of Appearance, in order to avoid potentially being held in contempt. (DeBoer Aff. at ¶ 4.)

The trial went forward on May 30, 2006, and Meadowlake Defendants were unable to cross examine Plaintiff's witnesses, offer evidence, make objections or otherwise participate or defend themselves in

the proceedings. Subsequently, in late June 2006, Meadowlake Defendants retained replacement counsel. On July 11, 2006, Meadowlake Defendants, by and through counsel, moved the trial court for an evidentiary hearing in order to present evidence on the record. (See Defendant's Motion for Evidentiary Hearing.) Meadowlake Defendants Motion was denied on August 1, 2006. Shortly thereafter, the final judgment entry was issued by the Court on August 4, 2006, which Meadowlake Defendants now appeal. (See Judgment Entry attached hereto as **Exhibit F**.)

[6] **ARGUMENT**

ASSIGNMENT OF ERROR NUMBER ONE

THE TRIAL COURT ERRED BY PROCEEDING TO TRIAL ON MAY 30, 2006, WITH THE KNOWLEDGE THAT MEADOWLAKE DEFENDANTS WERE UNREPRESENTED BY COUNSEL FOR REASONS BEYOND THEIR CONTROL.

It is crucial that corporate entities to be afforded the opportunity to obtain new counsel when the corporation's counsel withdraws prior to trial because corporate entities cannot proceed with the defense of a civil action without representation by counsel. *Gueli v. David L. Carter Productions, Inc.*, (July 29, 1982), 10th Dist. No. 82AP-249, attached hereto as **Exhibit G**. Further, the Ninth District has held that it was error for the trial court to enter judgment against an individual who failed to obtain counsel after having

been granted thirty days leave to secure substitute counsel. *Metaxas v. General Motors Corp.* (March 25, 1988), 11th Dist. No. 3912, attached hereto as **Exhibit H**. In that case, the trial court had entered judgment against Metaxas who was unrepresented at trial, holding that she failed to prosecute her action and present any evidence on her own behalf. Id. Because *Metaxas* had difficulty speaking or understanding English, she had a difficult time finding replacement counsel who spoke and understood Greek within the thirty day limit, and therefore she was entitled to provide facts to the court. Id.

Similarly, in this matter, Appellants were unable to retain substitute counsel in the time allotted after withdraw [sic] of their former counsel, due to extenuating circumstances beyond their control. Like the appellee in *Metaxas* who had a difficult time finding replacement counsel who spoke and understood Greek, Meadowlake had a difficult time finding and retaining replacement counsel who understood the complexities of this environmental matter. (See Affidavit of Roy Barr attached to Motion for Evidentiary Hearing, attached hereto as **Exhibit I**.) Environmental [7] law constitutes a relatively narrow focus of practice and involves complex matters. Very few local attorneys practice in this area, and therefore the pool of available attorneys from which Meadowlake Defendants had to choose was already greatly diminished. Additionally, there was a relatively short time period for replacement counsel to prepare and review the voluminous amount of material and

research gathered over the previous two years during which this matter had been pending.

In spite of all of the difficulties, and after meeting with over a dozen attorneys, Meadowlake Defendants found potential replacement counsel in attorney D. Patrick DeBoer, Esq., with whom they had a previous legal relationship. (Barr Aff., Exhibit I). Mr. Barr had contacted Attorney DeBoer in early spring 2006 regarding potential representation of Meadowlake Defendants in the pending matter. (See DeBoer Aff. at 2.) As environmental matters were not Attorney DeBoer's area of expertise, he informed Mr. Barr that he would try to find another attorney to represent Meadowlake Defendants. (DeBoer Aff. at 2.) Despite the efforts of both Mr. Barr and Attorney DeBoer replacement counsel was not found.

On or about April 18, 2006, Attorney DeBoer received serious injuries as a result of a skiing accident, and was physically unable to represent Meadowlake Defendants at the May 30, 2006 trial. (DeBoer Aff. at 3.) Attorney DeBoer called the court to inquire as to the possibility of obtaining a continuance of the trial date. (DeBoer Aff. at ¶ 3; Transcript of proceedings at p. 11.) When told that a grant of such a motion was doubtful, and knowing that he was physically unable to proceed with the trial as scheduled, Attorney DeBoer declined to file a Notice of Appearance, in order to avoid potentially being held in contempt. (DeBoer Aff. at ¶ 4.)

Meadowlake Defendants inability to find replacement counsel prior to trial was due to circumstances outside of their control, despite diligent efforts to obtain representation. As [8] unrepresented corporate entities, Meadowlake Defendants were unable to present any defense, and were at a great disadvantage with much at stake. The trial court's failure to continue the matter to provide Meadowlake Defendants with an opportunity to obtain counsel and present a defense was prejudicial error.

ASSIGNMENT OF ERROR NUMBER TWO

THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION FOR EVIDENTIARY HEARING THEREBY DENYING APPELLANTS THE OPPORTUNITY TO PROFFER EVIDENCE, CROSS EXAMINE WITNESSES, PRESERVE ERRORS, OR OTHERWISE DEFEND THEIR POSITION.

Due process requires that a party whose rights are sought to be affected be afforded a full hearing with the opportunity to introduce evidence on one's behalf and have judicial findings based upon it. *Jennings v. Mahoney* (1971), 404 U.S. 25, 26, 92 S. Ct. 180, 30 L. Ed.2d 146; *City of Maumee* (January 16, 1987), 6th Dist. No. L-86-168, attached hereto as **Exhibit J**. Due process implies the right to contradict by proof every material fact which bears on the question of the rights involved. See *Jennings v. Mahoney*, 404 U.S. 25. There is no hearing in the constitutional sense where the party is not given a

meaningful opportunity to test, explain, or refute evidence. 404 U.S. at 26, 92 S. Ct. 180, 30 L. Ed.2d 146.

The right to confront and cross-examine witnesses is a fundamental aspect of procedural due process. *Jenkins v. McKeithen,* (1969), 395 U.S. 411, 428, 89 S. Ct. 1843; 23 L. Ed. 2d 404. The right to present evidence is essential to a fair hearing required by the Due Process Clause. Id. at 429.

Meadowlake Defendants were ultimately denied their due process rights to introduce evidence and to confront and cross-examine witnesses. Counter to the allegation by the State of Ohio, Meadowlake Defendants immediately began to seek substitute counsel in order to [9] participate in trial. (Barr Aff. Exhibit H). When Attorney DeBoer was ultimately physically unable to represent Meadowlake, and was informed that the trial court was not inclined to grant a motion to continue the trial, Meadowlake Defendants were left to silently sit through the May 30, 2006 trial. The Meadowlake Defendants, and their corporate officers were unable to present evidence, cross-examine witnesses, preserve errors or otherwise present or defend their position at trial. This seriously prejudiced Appellants' interests and violated their procedural due process rights. After retaining replacement counsel, Meadowlake Defendants moved the Court for an evidentiary hearing in order to at least present evidence on the record, prior to the submission of a post trial brief. The trial court denied Defendants' Motion, again denying Meadowlake Defendants any

opportunity for a meaningful defense and violating their due process rights. (See August 1, 2006, Judgment attached hereto as **Exhibit K**). Accordingly, the trial court's final judgment entry should be vacated and the cause remanded for a new trial.

ASSIGNMENT OF ERROR NUMBER THREE

THE TRIAL COURT ERRED BY DENYING APPELLANT'S DEMAND FOR JURY TRIAL.

It is prejudicial error for a trial court to refuse the demand of a party for a trial by jury in a civil action coming within the statutory description of those which are required to be tried by jury. *MacKenzie v. Stuber* (1929), 119 Ohio St. 588, 7 Ohio L. Avs. 109, 165 N.E. 296. Whether there has been a violation of an ordinance or statute is a question which is normally left to the province of a jury unless the statute at issue imposes an absolute duty and there is no question regarding the underlying factual circumstances. *Dalton v. The Cleveland Elec. Illuminating Co.*. (1919), 30 Ohio C.A. 24. It is not for the court to substitute its process of [10] reasoning, however, apparently sound, for that of the jury, in a field which belongs peculiarly to the latter." *Drake v. East Cleveland* (1920), 101 Ohio St. 111, 120, 127 N.E. 469.

"In cases involving both legal and equitable claims, the trial court must determine the dominating object of the litigation in evaluating the merits of the jury demand." *Prairie Twp. Bd. of Trustees vs. Stickles*

(February 3, 1994), Franklin App. No. 93 Ap-824, attached hereto as **Exhibit L.**) In the case *City of Mentor v. Nozik* (September 23, 1994), 11th Dist. No. 93-L-130, upon which Plaintiff relied in its pleadings is factually distinct from this matter. (See *City of Mentor v. Nozik* attached hereto as **Exhibit M**). In *Nozik*, the Complaint only requested injunctive relief, and therefore it was founded in equity alone, and no right to a jury trial existed.

In this case, however, the Complaint filed by the Attorney General's Office on behalf of the Environmental Protection Agency, specifically asked for civil penalties in an amount exceeding $63 million dollars, pursuant to R.C. Section 6109.33. *Mentor v. Nozik* can be further distinguished because in that case the action originally arose as a declaratory judgment action regarding the validity and interpretation of the statutes at issue, brought by the party alleged to have violated the statute. In this case, however the primary focus of the EPA's Complaint has been to pursue civil penalties against Defendants, which in fact were awarded by the trial court in an astonishing record breaking amount of $300,000.00.

The standard for determining if a party is entitled to a jury trial in a mixed, legal and equitable action, such as exists here, is: "When a case presents both a legal and equitable claim for relief, and the money demand is 'incidental and ancillary' to the equitable claim and can be awarded only if the equitable relief is granted first, then the case is predominantly an equitable action for which no jury trial is

required." *Raskow v. Fortner* (April 15, 1998), 9th Dist. No. 18399, attached hereto as **Exhibit N**. In other words, in order for a court to deny a party's right [11] to a jury trial, the court must first determine that the money demand is "incidental and ancillary" to the equitable relief **and** the court must conclude that the civil penalty can be awarded **only** if the equitable relief is granted first. The statutory scheme set forth in Chapter 6109 clearly recognizes that injunctive relief and civil penalties are distinct and separate remedies. Revised Code 6109.32 addresses injunctive relief whereas R.C. 6109.33 addresses civil penalties. Were these remedies one and the same, they would surely have been codified in one code section.

A review of the separate statutes governing injunctive relief and civil penalties pursuant to Chapter 6109 of the Ohio Revised Code clearly illustrates that the remedies are mutually exclusive. Revised Code 6109.32 empowers the Attorney General to bring an action for injunction against any person violating or threatening to violate R.C. 6109.31, the prohibition section of that chapter. The following section, R.C. 6109.33, provides a separate and distinct remedy, which can be pursued irrespective of any equitable remedy. Specifically, R.C. 6109.33 authorizes the State to pursue civil penalties up to $25,000 for each violation of R.C. 6109.31. The State can choose to pursue civil penalties pursuant to R.C. 6109.33 **independently** of the injunctive remedy contained in R.C. 6109.32. The civil penalty

remedy is available independent from the injunction. Therefore, **the granting of an injunction is not necessary for the award of a monetary penalty.** Because the monetary penalty can be awarded independently, whether or not equitable relief is granted first, the test contained in *Raskow v. Fortner* is not satisfied and therefore Meadowlake Defendants are and were entitled to a jury trial.

Plaintiff successfully argued that the demand for civil penalties is incidental to the equitable relief requested. Webster's Dictionary defines incidental as "minor or casual or subordinate in significance." Certainly a $63 million dollar demand and a $300,000.00 actual penalty assessed against a small business cannot be considered incidental under any [12] interpretation of that word.

Further, there are significant questions regarding the underlying factual circumstances of this matter. The Meadowlake Defendants were entitled to have the following factual issues determined in a jury trial:

1. Whether the farmhouse well casing terminates at least eight inches above the finished grade, which the Court answered in the negative. (See Finding of Fact 20).

2. Whether Defendants serve water for human consumption to at least 25 people on a daily basis for at least 60 days out of the year, which the trial court never addressed, but deferred to the determination of the EPA; and most importantly.

3. What if any civil penalties should be imposed against Defendants? which the court answered affirmatively and by Judgment Entry imposed civil penalties of $300,000.00.

As Meadowlake Defendants correctly noted in their December 30, 2005 Supplemental Memorandum, these are factual issues that should have been determined by a jury. The paramount issue, whether Meadowlake Defendants owned and operated a "public water system" was not even determined by the Court, rather the court deferred to the EPA's determination that such was the case. The trial court's Findings of Fact Nos. 2 and 3 stated:

2. The Ohio Environmental Protection Agency ("Ohio EPA") determined, beginning in the year 1996, that Meadowlake Corporation owned and operated a "public water system" on the Meadowlake property. The Ohio EPA determined, effective May 2001, the onset of its legal existence, that Meadowlake Ltd. owned and operated a "public water system" on the Meadowlake property.

3. The determinations by the Ohio EPA that the Defendants own and operate a "public water system" at the 39th Street NE, Canton, Ohio, location have not been overturned pursuant to the laws of the State of Ohio.

[13] From the plain language of the Court's Findings of Fact, this factual issue was not even determined by the Court, but rather the EPA. Clearly,

Defendants' right to have the material facts at issue determined by a jury has been violated.

Plaintiff's own documents are in conflict with respect to the factual circumstances at issue. For example, although Mr. Bowland testified that the well casing did not terminate eight inches above grade, his previous documentation on the well survey evaluation and inventory report concluded the exact opposite, that the casing did terminate eight inches above grade, and was acceptable. (See Exhibit A.)

Defendants' constitutional and procedural rights to a trial by jury have been violated by the trial court's disregard for Meadowlake Defendants' rights. The trial court's denial of Appellants' right to a jury trial constitutes reversible error. Accordingly, the Judgment Entry of August 4, 2006, should be vacated and this matter remanded to the trial court for trial before a jury.

ASSIGNMENT OF ERROR NUMBER FOUR

THE PENALTIES THAT THE TRIAL COURT AWARDED TO THE OHIO EPA ARE EXCESSIVE, ARBITRARY, INAPPROPRIATE, AND IN VIOLATION OF APPELLANTS' DUE PROCESS RIGHTS.

A. The penalties assessed by the trial court are excessive in light of the fact that no credible threat to the Meadowlake water supply exists, and therefore no threat to the public health exists.

The EPA contends that the penalties assessed are warranted due to the threat to the public health, however, the EPA failed to present evidence that the well had contamination from surface water intrusion, or even that such was likely to occur. In fact, the EPA has shown no change in [14] circumstances that would warrant the reclassification of the well leading to the majority of the violations sought to be enforced by way of civil penalties. If in fact the public health were in danger, the Stark County Health Department would have pulled Meadowlake Ltd's' food service license. On the contrary, the Stark County Health Department, which oversees and conducts regular inspections of the Club, has determined that Appellants' actions are not a threat to the consumers of food and beverages at Meadowlake. (Testimony of David Rowland p. 251; Scott William's EPA correspondence of April 28, 2003, attached hereto as **Exhibit O**.) The EPA ordered the Stark County Health Department to rescind the Club's food service license. (See Exhibit O). Despite this notice the Stark County Health Department found the EPA's position to be unwarranted and unsupported, and therefore determined that Meadowlake was entitled to retain its license. (See Exhibit O).

At trial Appellee argued that the penalties should be significant because Meadowlake Defendants went "ten years without sampling," and therefore created a risk to the public. (Trial Trans. p. 30). This statement however is not true. According to Plaintiff's witness, David Bowland, the Meadowlake Defendants did

sample, but the EPA did not credit the samples because the EPA did not consider the majority of the samples to conform to the EPA's compliance evaluation. (Trial Trans. p. 96). Because many of the samples omitted the public water system ID number, they were not counted. Also if the sample was not marked routine it would not be counted. If the wrong box was checked, or any other deviation existed from the EPA's protocol, the sample and test results were treated as if they did not exist.

Additionally, the penalties assessed were based in part upon violations for the Meadowlake Defendants' failure to post a public notices [sic] regarding failure to sample. However, as was noted previously, the sampling did occur; the sampling reports merely were in a format [15] deemed non-conforming to the EPA.

Furthermore, counsel for the EPA in its own correspondence conceded that there was not a threat to the health and safety of the Meadowlake patrons. (See Exhibit O, which stated that the Attorney General's office did not consider there to be any eminent health concern with the Well as there were no total coliform or e.coli test positives). As the EPA's own representatives concluded, there is no credible threat to the public health warranting the imposition of such excessive fines. All of the well tests reflect no bacteriological contamination.

Furthermore, the EPA sanitary survey conducted on June 30, 1998 by Ted Conlin and David Bowland

concluded that the well casing terminated at least eight inches above grade and there was not a threat of flooding. The EPA's own records do not support its argument that there is a credible threat of contamination to the well, and therefore there is not a cognizable public health or safety risk. The penalty assessed by the trial court is arbitrary, unreasonable and excessive in light of the fact that there is no evidence that the water at Meadowlake is unsafe or even likely to be contaminated.

B. The trial court erred in failing to consider the factors that should be considered when assessing a penalty, most notable being a complete lack of evidence presented regarding Defendants' financial ability, or inability to pay.

In *Brown v. Dayton Malleable Iron* (1982), 1 Ohio St. 3d 151; 1 O.B.R. 185, 438 N.E.2d 120, a case arising under Rev. Code Chapter 6111[1] governing water pollution, the parties agreed that the U.S. Civil Penalties Policy was the appropriate standard. Pursuant to the U.S. EPA's Civil Penalty Policy, the factors that are to be considered in assessing a penalty in order to deter future violations include: (1) the

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[1] Although, Chapter 6111 violations usually involve active polluting activities, whereas the notice of violations arising in this case arise from omissions under Chapter 6109, Plaintiff's Brief in Support asks Requested Civil Penalty Determination argued for the application of civil penalties pursuant to the U.S. EPA Civil Penalty Policy applicable to Chapter 6111 in the absence of guiding caselaw specific to Chapter 6109.

defendant's good or bad faith; (2) the defendant's financial gain attributable to the violations; and (3) the environmental harm resulting from the violations.

[16] *Brown v. Howard* (1981), 3 Ohio App.3d 189, 191, 3 O.B.R. 216, 444 N.E.2d 469. The size of the business is a factor that is to be considered. 1 Ohio St. 3d at 157; 1 O.B.R. 185, 438 N.E.2d. Moreover, the defendant's ability to pay is a "significant factor" that is necessary to consider in making any penalty determination. Id.

The purpose of a civil penalty is deterrence, not punishment. 1 Ohio St. 3d at 159; 1 O.B.R. 185, 438 N.E.2d 120. It is for this reason that the defendant's income must be considered. "A civil penalty is simply a monetary sum that is assessed and recovered in a civil proceeding for a violation of law. Although a civil penalty may be viewed as a sanction in the sense that it is imposed to produce obedience to environmental laws, it is not intended to punish the violator. Its purpose is deterrence or compensation, not retribution." 1 Ohio St. 3d at 160; 1 O.B.R. 185, 438 N.E.2d 120. Moreover, civil penalties are not favored and should be imposed only when clearly justified. Id.

First, the Court was to consider the good or bad faith of the defendant. It is undisputed that the Meadowlake Defendants did not believe that the Club was properly classified as a public water system, and therefore not subject to regulation by the EPA, but rather were governed by the local health department.

Further, Appellants did not sit idly by and do nothing in response to the actions that the EPA was requiring them to take as a result of the Well reclassification. (See Exhibit C.) Meadowlake Defendants in fact corresponded with the EPA regarding possible well improvements after having been informed of the onerous requirements being levied upon them. (Trial Trans. P 84). As was stated previously, Meadowlake Defendants have collected and tested water samples from the Well, all of which indicated that there was not a risk to the public health. Any alleged bad faith on the part of Meadowlake Defendants has been grossly overstated.

There was no evidence presented that Defendants gained financially, and therefore this [17] factor could not have been considered by the trial court. Similarly, there was no evidence presented regarding the Meadowlake Defendants' revenue, therefore the court could not have taken this "significant factor" into consideration. As the purpose of a civil penalty is deterrence and not punishment, it was necessary for the trial court to assess the appropriateness of the proposed penalty in light of the Meadowlake Defendants' financial condition. The Court's Judgment Entry merely adopts the penalty proposed by the EPA without any consideration of the size of the businesses affected. Clearly a penalty of $300,000.00 assessed against a small seasonal business goes beyond deterrence as such will bankrupt the businesses.

Finally, the court was required to take into consideration the harm caused by the defendant's

conduct. In this case, there is no evidence of contamination. Further, unlike many of the cases in which civil penalties have been levied, the Appellants in this case were not engaged in any activity that would cause pollution. Many of the cases involving a civil penalties determination contain facts that indicate that those defendants were involved in active dumping or other willfully polluting activities. Here even the EPA conceded that no cognizable threat to the public health existed.

Finally, he [sic] trial court failed to consider that the underlying purpose of any fine is deterrence and not punishment. Imposition of a fine of this size for a small seasonal business is arbitrary, unreasonable and unsupported by the record, and should be reversed.

C. The penalties assessed against Meadowlake are grossly excessive under the circumstances and in violation of the Eighth Amendment.

The United States Supreme Court has held that the Eighth Amendment's prohibition against excessive fines applies to the states and prohibits them from imposing "grossly excessive" punishments on tortfeasors. *BMW of N. Am. v. Gore* (1996), 517 U.S. 559, 562, 116 S.Ct. 1589, 134 L.Ed.2d. 809. In determining whether a penalty is grossly excessive, a court is to [18] consider three points: (1) the degree of the defendant's reprehensibility or culpability; (2) the disparity between the penalty and the harm to the victim caused by the defendant's actions; and (3) the

difference between the remedy and the civil penalties authorized in other cases for comparable misconduct. Id. at 575, 116 S.Ct. 1589, 134 L.Ed.2d 809.

As was noted previously, the degree of Meadowlake Defendants' misconduct has been grossly overstated. Moreover, no harm has been shown to have occurred. There are no comparables under Chapter 6109. This is not a case involving willful pollution such as in the cases arising under Chapter 6111 of the Ohio Revised Code, but rather this case revolves around records violations and technical omissions from the sample forms, stemming from Meadowlake Defendants ongoing dispute with the EPA regarding whether it is in fact a public water system subject to regulation. Under the circumstances, the $300,000.00 civil penalty is grossly excessive and in violation of the Eight Amendment.

CONCLUSION

Meadowlake Defendants' rights have been repeatedly violated during the proceedings at the trial level. First, Meadowlake Defendants' due process rights were disregarded when the Court proceeded with the case with the knowledge that Defendants were unrepresented by counsel, and as corporate entities were unable to represent themselves. The trial court then arbitrarily denied Meadowlake Defendants' Motion for Evidentiary Hearing, completely foreclosing any opportunity for Defendants to proffer evidence or present any defense to the EPA's claims.

The trial court again committed reversible error when it denied Meadowlake Defendants' right to a jury trial. This matter involved a sizable civil penalty request pursuant to R.C. 6109.33, which is separate and distinct from the equitable relief sought by the EPA. As the matter is not primarily equitable in nature, Meadowlake Defendants were entitled to a jury trial.

[19] Finally, the Trial Court's award of civil penalties in the amount of $300,000.00 is arbitrary and excessive. The penalty determination did not involve any consideration of Meadowlake Defendants' size and financial status, critical factors in such a determination. As a small seasonal business an award of this size goes beyond deterrence and amounts to the most severe form of punishment, bankruptcy of the Meadowlake Defendants.

WHEREFORE, for the foregoing reasons, Meadowlake Corporation and Meadowlake Ltd. respectfully request that the trial court's decision be vacated and remanded for trial before a jury.

Respectfully Submitted,

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